CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934

No. 37

ZELLERBACH PAPER COMPANY, PETITIONER,

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 10, 1934

CERTIORARI GRANTED JUNE 4, 1934

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 37

ZELLERBACH PAPER COMPANY, PETITIONER,

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

INDEX

	Page
Proceedings before United States Board of Tax Appeals	1
Docket entries	1
Petition	6
Exhibit "A"—Notice of deficiency	22
Exhibits "A-1" to "A-6"—Depreciation statements	50
Answer	56
Motion for leave to file amended petition	57
Amended petition	58
Stipulation as to certain facts	74
Answer to amended petition	75
Stipulation as to certain facts	77
Exhibit "A"—Income and profits tax waiver, Feb. 27, 1925.	79
Findings of fact and opinion, Murdock, M.	81
Dissenting opinion, Van Fossan, M.	90
Motion as to finding of deficiencies	91
Notice under Rule 50	93
Decision	94
Petition for review	95
Notice of filing of petition for review	102
Statement of evidence	103
Caption	103
Motion for consolidation	104

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 27, 1934

—5128-C

	Page
Colloquy	107
Testimony of Alonzo Wallace Helvern	109
Order settling statement of evidence	113
Præcipe for transcript of record	114
Clerk's certificate	115
Proceedings in United States circuit court of appeals, ninth circuit	117
Stipulation and order for consolidation	119
Order substituting party respondent	123
Order of submission	123
Order directing filing of opinion and judgments	124
Opinion, Wilbur, J.	125
Judgment	142
Application for stay of mandate	142
Order staying issuance of mandate	144
Clerk's certificate	145
Order allowing certiorari	146

APPEARANCES.

For Taxpayer:

J. F. NEYLAN, Esq.,
J. P. MILLER, Esq.,
W. C. MAGATHAN, Esq.

For Comm'r:

H. A. COX, Esq.,
F. R. SHEARER, Esq.,
E. L. CORBIN, Esq.

Docket No. 39701

ZELLERBACH PAPER COMPANY,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES.

Transferred to Mr. Murdock 3/28/32

1928

Jul. 9—Petition received and filed. Taxpayer notified. (Fee paid)

" 10—Copy of petition served on General Counsel.

Aug. 7—Answer filed by General Counsel.

" 9—Copy of answer served on taxpayer. Circuit Calendar.

1931

Feb. 10—Stipulation of facts filed.

Mar. 13—Motion for leave to file amended petition filed by taxpayer, amended petition tendered. 3/16/31 granted. 3/19/31 copy served.

1931

Apr. 24—Hearing set June 10, 1931 at Oakland, California.

May 12—Answer to amended petition filed by General Counsel. Copy served 5/27/31.

Jun. 10—Hearing held before E. H. Van Fossan, Div. 9, on merits. On motion of counsel consolidated with dockets 39704 and 39715 for hearing and decision. Briefs due in 60 days.

Jul. 13—Transcript of hearing of June 10, 1931 filed.

Aug. 6—Motion for extension of time to Aug. 31, 1931 to file brief filed by taxpayer. August 8, 1931 granted.

" 7—Motion for extension of 60 days from Aug. 9, 1931, to file brief filed by General Counsel.

" 11—Motion for extension of 60 days to file respondent's brief granted.

" 31—Brief filed by taxpayer.

Oct. 6—Brief filed by General Counsel.

1932

Jan. 21—Motion for leave to file reply brief filed by taxpayer. Granted 1/29/32.

" 29—Reply brief filed by taxpayer. 1/30/32 copy served on General Counsel.

May 17—Findings of fact and opinion rendered, John E. Murdock, Div. 3. Judgment will be entered under Rule 50.

" 21—Notice of appearance of J. Paul Miller as counsel for taxpayer filed.

1932

May 31—Notice of settlement filed by General Counsel.

Jun. 3—Hearing set June 29, 1932 under Rule 50.

" 29—Hearing had before Miss Matthews, Div. 13, on settlement under Rule 50. Not contested. Referred to Mr. Murdock for decision.

Jul. 9—Decision entered, Logan Morris, Div. 14. [1*]

Oct. 4—Supersedeas bond in the amount of $139,000 approved and filed.

" 4—Petition for review by U. S. Circuit Court of Appeals (9) with assignments of error filed by taxpayer.

" 4—Proof of service filed.

" 31—Praecipe filed.

" 31—Proof of service filed.

Nov. 23—Statement of evidence lodged.

" 23—Notice of lodgment and hearing notice 12/8/32 filed.

" 25—Notice of change of hearing date from Dec. 8, to Dec. 7, 1932.

" 30—Objections to statement of evidence filed by General Counsel.

Dec. 2—Order of U. S. Circuit Court of Appeals 9th Circuit enlarging time to 1/3/33 to transmit record filed.

---

*Page numbering appearing at the foot of page of original certified Transcript of Record.

1932

Dec. 2—Motion for a continuance to January 6, 1933 for hearing on statement of evidence filed by taxpayer. 12/5/32 granted and set for hearing Dec. 28, 1932.

" 15—Proof of service of objections filed by General Counsel.

" 27—Order from U. S. Circuit Court of Appeals (9) extending time to Feb. 3, 1933 to file transcript filed.

" 28—Hearing had before Mr. Sternhagen on approval of statement of evidence. Continued to Jan. 11, 1933 on motion of petitioner.

" 28—Order of continuance to Jan. 11, 1933 for hearing on approval of statement of evidence entered.

1933

Jan. 7—Order from Circuit Court of Appeals, 9th Circuit to transmit petitioner's exhibit No. 1 and respondent's exhibit A in original form filed.

" 11—Hearing had before Mr. Arundell on approval of statement of evidence. Continued to Jan. 25, 1933.

" 11—Motion to postpone hearing to Jan. 20, 1933 filed by taxpayer. 1/11/33 granted to 1/25/33.

" 23—Copy of order from 9th Circuit enlarging time to March 3, 1933 to file transcript filed.

1933

Jan. 25—Hearing had before Mr. Marquette on approval of statement of evidence. On petitioner's motion continued to 2/15/33.

Feb. 15—Hearing had before Mr. Murdock on approval of statement of evidence. Agreed statement of evidence to be filed.

" 28—Copy of order from U. S. Circuit Court of Appeals (9) granting extension to 4/3/33 to complete record filed.

Mar. 14—Order from U. S. Circuit Court of Appeals, 9th Circuit consolidating with dockets 39704 and 39715 to send up one record filed.

Apr. 3—Order from U. S. Circuit Court of Appeals, 9th Circuit extending time to 5/3/33 to complete record filed.

May 4—Order from U. S. Circuit Court of Appeals, 9th Circuit extending time to 6/3/33 to complete record filed.

" 8—Hearing had before J. E. Murdock, Div. 3 on settlement of evidence. Agreed statement to be filed.

" 19—Agreed statement of evidence lodged.

" 19—Amended praecipe filed.

" 19—Proof of service filed.

" 23—Agreed statement of evidence approved and ordered filed.

Jun. 2—Order from U. S. Circuit Court of Appeals (9) extending time to 7/3/33 to complete record filed.

" 2—Stipulation that transcript of minutes of hearing 5/8/33 be included in record filed. [2]

United States Board of Tax Appeals

Docket No. 39701

ZELLERBACH PAPER COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION.

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:CR:D:60-D:CAM) dated May 11, 1928, and as a basis for its proceeding alleges as follows:

1. The petitioner is a corporation organized under the laws of the State of California and having its principal place of business at 534 Battery Street, San Francisco, California.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on May 11, 1928.

3. The taxes in controversy are income and profits taxes for the fiscal year ended April 30, 1921, and for Sixty-four Thousand Twenty-four and 37/100 Dollars ($64,024.37). [3]

The deficiency of $64,024.37 is a portion of a total deficiency of $96,854.59, assessed by the Commissioner of Internal Revenue against Zellerbach

Paper Company and its subsidiaries for the fiscal year ended April 30, 1921, as follows:

Zellerbach Paper Company (parent)	$64,024.37
National Paper Products Company (subsidiary)	31,141.52
A. S. Hopkins Company (subsidiary)	1,688.70
Total deficiency	$96,854.59

The above total deficiency is based upon certain adjustments made by the Commissioner of the consolidated income of Zellerbach Paper Company, National Paper Products Company, Sanitary Products Corporation and A. S. Hopkins Company.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

A. ZELLERBACH PAPER COMPANY.

(a) The Commissioner erred in determining the deficiency set forth in his 60-day letter dated May 11, 1928, in respect of the taxes sought to be assessed for the fiscal year ended April 30, 1921, because the assessment of any additional tax for the said fiscal year is barred by Section 250.(d) of the Revenue Act of 1918; Section 250.(d) (1) of the Revenue Act of 1921; Section 277.(a) . . (1) and Section 277.(a) . . (2) of the Revenue Act of 1924; [4] and Section 277.(a) . . (2) and Section 277.(a) (3) of the Revenue Act of 1926.

(b) The Commissioner in determining the deficiency set forth in his 60-day letter dated

May 11, 1928, erred in proceeding upon the theory that inasmuch as the petitioner had filed its income tax return under the Revenue Act of 1918, but no additional return was filed by the petitioner under the Revenue Act of 1921, that no statute of limitation applies.

(c) The Commissioner in determining the deficiency set forth in his 60-day letter dated May 11, 1928, erred by ignoring the fact that inasmuch as there were no items of income or deduction in the consolidated income tax return filed by Zellerbach Paper Company requiring to be treated differently under the respective Revenue Acts of 1918 and 1921, and since the rates of income and profits taxes were the same under both Revenue Acts for the fiscal year involved, no additional tax would be shown by the filing of a second return under the 1921 Act; a proper return having been filed under the 1918 Act by this taxpayer.

(d) The Commissioner in determining the deficiency set forth in his 60-day letter dated May 11, 1928, erred in adding $7,293.86 to the petitioner's income [5] representing a write-down of the petitioner's inventory at Batavia, Java, branch from cost to fair market value as at April 30, 1921.

(e) The Commissioner in determining the deficiency set forth in his 60-day letter dated May 11, 1928, erred in adding $2,249.61 to the petitioner's income representing losses of customers' accounts at the petitioner's Batavia,

Java, branch actually determined during the fiscal year ending April 30, 1921.

(f) The Commissioner in determining the deficiency set forth in his 60-day letter dated May 11, 1928, erred in adding $4,167.29 to the petitioner's income representing an actual loss in value (discovered in February 1921) of an inventory of merchandise as at December 31, 1920, and other assets which had been acquired by Zellerbach Paper Company from A. S. Hopkins Company.

(g) The Commissioner in determining the deficiency set forth in his 60-day letter dated May 11, 1928, erred in disallowing as a deduction from the petitioner's income, $840.00, representing wages paid by the taxpayer to the captain of the yacht owned by I. Zellerbach (petitioner's president), which yacht was used in connection with the petitioner's business. [6]

B. NATIONAL PAPER PRODUCTS COMPANY

(h) The Commissioner in determining the deficiency set forth in his 60-day letter dated May 11, 1928, erred in disallowing $21,421.05, representing write-down of the value of the wood in process inventory of National Paper Products Company at Carthage, New York, from cost to actual market value as at April 30, 1921.

C. CONSOLIDATED INVESTED CAPITAL

(i) The Commissioner in determining the deficiency set forth in his 60-day letter dated May 11, 1928, erred in excluding from the petitioner's invested capital the amount of $10,000.00, representing the value of certain patents, which value had been substantiated by the taxpayer.

(j) The Commissioner in determining the deficiency set forth in his 60-day letter dated May 11, 1928, erred in deducting from the petitioner's consolidated invested capital the following items, the determination of the correct amount of which is dependent upon the settlement of the taxes in controversy for prior years:

1917, 1918, 1919 taxes adjusted	$496 471.96
1920 taxes prorated	255 340.40
Inadmissibles	685 705.61

[7]

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

The petitioner, Zellerbach Paper Company, is a corporation organized and existing under and by virtue of the laws of the State of California with its principal office at 534 Battery Street, San Francisco, California.

The National Paper Products Company and Sanitary Products Corporation were throughout the fiscal year ended April 30, 1921, wholly

owned subsidiaries of the petitioner.

The majority of the capital stock of A. S. Hopkins Company was acquired by the petitioner on or about October 1, 1920, and the remaining outstanding shares were acquired shortly thereafter, and this subsidiary corporation was dissolved and its assets taken over in liquidation by Zellerbach Paper Company about February 28, 1921, in exchange for the shares of its stock which were cancelled.

The net income of A. S. Hopkins Company for the nine months period ended September 30, 1920, was included in a separate income tax return which was filed with the Collector of Internal Revenue at San Francisco, California, March 15, 1921. The income of A. S. Hopkins Company from and after October 1, 1920, to and including the date of its dissolution, about February 28, 1921, was included in the consolidated income tax return filed by Zellerbach Paper Company and its subsidiaries for the fiscal year [8] ended April 30, 1921. From and after the date of the liquidation of A. S. Hopkins Company, the business which it had formerly conducted at Sacramento, California, was conducted by Zellerbach Company as its Sacramento branch.

The petitioner filed a consolidated income tax return July 15, 1921, covering its own income and the income of National Paper Products Company and Sanitary Products Corporation for the fiscal year ended April 30, 1921, and also

included therein the income of A. S. Hopkins Company from October 1, 1920 to the date of its dissolution. This consolidated income tax return was correctly prepared in accordance with the provisions of the Revenue Act of 1918, which was the revenue act in effect at the time that the said return was due. The said consolidated income tax return filed on July 15, 1921, was the only income tax return that has been filed by the taxpayer. All items of income and expense included in the taxpayer's operations and in the operations of its subsidiaries are reflected in the said consolidated income tax return filed on July 15, 1921 and are of such nature that the Revenue Act of 1921 is applicable thereto in exactly the same manner as the Revenue Act of 1918. The taxpayer, after the enactment of the Revenue Act of 1921, did not prepare and file another return; such return, if filed, would have been of exactly the same tenor as the return which had already been filed by the taxpayer on July 15, 1921, as the various items of income and the [9] expense included in the operations of the taxpayer and its subsidiaries were required to be treated exactly the same under both the Revenue Act of 1918 and the Revenue Act of 1921.

The first deficiency notice for the fiscal year ended April 30, 1921, received by the petitioner from the Commissioner of Internal Revenue was mailed to the petitioner on May 11, 1928, being

received by the petitioner several days thereafter.

The said first deficiency notice was mailed more than five years after said consolidated income tax return for the fiscal year ended April 30, 1921 was filed, to-wit; approximately six years and ten months thereafter.

The taxpayer has never entered into any agreement in writing or otherwise with the Commissioner of Internal Revenue consenting to a later determination, assessment and/or collection of income or profits taxes or extending the time for said determination, assessment and/or collection of tax to any date beyond the statutory limitations provided by the Revenue Acts applicable to the tax for the fiscal year here in issue. The taxpayer has never waived the right to file a petition with the United States Board of Tax Appeals, nor consented to the assessment and collection of any deficiency in tax for the fiscal year ended April 30, 1921. [10]

During the fiscal year ended April 30, 1921 and for a number of years prior thereto, the taxpayer had operated a branch at Batavia, Java. Owing to the business depression in Java in the years 1920, 1921 and 1922, the taxpayer realized a profit of only $6,977.63 from the operations of this branch for the fiscal year ended April 30, 1921. In the succeeding fiscal year conditions were even worse, and the Batavia branch sustained losses aggregating $11,-351.29. In making determination of the pro-

fits of the Batavia branch for the fiscal year ending April 30, 1921, it was necessary to write down certain items in the inventory of merchandise from cost to the market value at April 30, 1921. The aggregate reduction of the inventory thus obtained was $7,293.86. Owing to the depressed business conditions, a review of accounts receivable of the Batavia branch indicated that items aggregating $2,249.61 included therein would be uncollectible, and a reserve was set up to take care of these losses.

The Commissioner in making his determination of the taxpayer's income disallowed the $7,293.86 write-down of the inventory and the reserve of $2,249.61 to provide for the losses of accounts, upon the theory that the write-down of inventory was a mere depreciation of inventory and that the loss of accounts receivable provided for by the reserve was merely an estimated loss. [11]

During the fiscal year ended April 30, 1921, and as at about December 31, 1920, Zellerbach Paper Company received as transferee from A. S. Hopkins Company an inventory of certain merchandise and certain accounts receivable owing to A. S. Hopkins Company and other assets. Certain merchandise of A. S. Hopkins Company having a value of $4,167.29 had been previously transferred to Zellerbach Paper Company and charged to it by the Hopkins Company. At the time of taking over the said assets from A. S. Hopkins Company, the value of this merchan-

dise, $4,167.29, was reflected on the books of the Hopkins Company as an account receivable. Owing to the fact that from about October 1, 1920, Zellerbach Paper Company had been in control of A. S. Hopkins Company, the corresponding credit of $4,167.29 had not been recorded on the books of Zellerbach Paper Company as a liability to A. S. Hopkins Company, although the merchandise received from the Hopkins Company had been included in Zellerbach Paper Company's inventories of merchandise, and, thus, when Zellerbach Paper Company took over all the assets of the Hopkins Company, (including the said account receivable of $4,167.29 on the books of A. S. Hopkins Company) the value of this account receivable was, in effect, a duplication in value of certain merchandise included in the merchandise inventories of Zellerbach Paper Company, which duplication in value had been taken up as income. [12]

In February 1921, this duplication was discovered, and the amount of $4,167.29 was charged to Zellerbach Paper Company's surplus account. The Commissioner disallowed this charge of $4,167.29 as a deduction and added it to the taxpayer's net income for the fiscal year ended April 30, 1921.

Mr. I. Zellerbach, during the fiscal year ended April 30, 1921, was, and still is, the president of Zellerbach Paper Company. He was the owner of a yacht which he used for the purpose of

entertaining business associates and customers of Zellerbach Paper Company and its subsidiary companies. The wages of the captain of this yacht, $840.00 for the fiscal year ended April 30, 1921, were paid by Zellerbach Paper Company and charged to its expenses. The Commissioner disallowed this expense upon the theory that it was not an ordinary and necessary expense of the business.

The National Paper Products Company, at the close of the fiscal year ended April 30, 1921, in taking its inventory at cost or market, whichever is lower, wrote down the value of its inventory of wood in process at its rossing plant at Aldrich, New York, in the amount of $21,-421.05. Certain timber had been cut and placed in the rossing process and records had been kept of the various costs applied to this timber in the said process. The wood in the inventory was situated at the company's plant at Aldrich, which was some distance from Carthage, New York, the point at which this wood was to be marketed. [13] To determine a market value applicable to this wood in process at Aldrich, the National Paper Products Company first applied the market price at Carthage and thereafter deducted the transportation and other costs which would have to be incurred in bringing this wood from Aldrich to Carthage.

The Commissioner disallowed the said write-down of the wood inventory on the assumption

that the market value had not been substantiated.

As at October 5, 1914, the National Paper Products Company (a subsidiary of the petitioner) acquired certain patents from the Lazar-Aicher Paper Company in exchange for $100,000 par of the capital stock of the National Paper Products Company. Subsequently, cash expenditures of $3,759.05 were made in perfecting these patents, and additional patents were acquired for $10,000 cash. These patents acquired for capital stock were originally set up on the books of the National Paper Products Company at a value of $100,000. By a subsequent book entry, $90,000 of the patent account was set up in an account designated "Goodwill". This goodwill of $90,000 was, as at April 30, 1916, written off against surplus.

The Commissioner refused to recognize any value as attaching to the patents acquired for capital stock and excluded the amount of $10,000 at which these patents were carried in the fiscal year ended April 30, 1921, in making his determination of the petitioner's consolidated invested capital. [14]

6. The petitioner prays for relief from the deficiency asserted by the Commissioner in the following and each of the following particulars:

(a) The petitioner prays the Board to find that the assessment of any additional tax for

the fiscal year ended April 30, 1921, is barred by Sections 250. (d) of the Revenue Act of 1918; Section 250. (d) . . . (1) of the Revenue Act of 1921; Section 277. (a) . . . (1) and Section 277. (a) . . . (2) of the Revenue Act of 1924; and Section 277. (a) . . . (2) and Section 277. (a) . . . (3) of the Revenue Act of 1926.

(b) The petitioner prays the Board to find that the Commissioner erred in proceeding upon the theory that inasmuch as no additional return was filed by the petitioner under the Revenue Act of 1921 after a return under the Revenue Act of 1918 had been filed, no statute of limitations applies.

(c) The petitioner prays the Board to find that there are no items of income or deduction in the consolidated income tax return filed by Zellerbach Paper Company requiring to be treated differently under the respective Revenue Acts of 1918 and 1921, and that the rates of both income tax and excess profits tax for the fiscal year ended April 30, 1921, are the same under the Revenue Acts of 1918 and 1921, and that the filing of an additional return under the Revenue Act of 1921 was not required, as a proper return had been filed under the 1918 Act by the petitioner.

(d) The petitioner prays the Board to find that Zellerbach Paper Company in determining its income for the fiscal year ended April 30, 1921, was entitled to write down its inventory

at Batavia, Java, branch by $7,293.86, being the excess of cost over its fair market value as at April 30, 1921.

(e) The petitioner prays the Board to find that Zellerbach Paper Company in determining its income for the fiscal year ended April 30, 1921, was entitled to charge off as a deduction $2,249.61 representing losses of customers accounts at Batavia, Java, branch actually determined as at April 30, 1921.

(f) The petitioner prays the Board to find that Zellerbach Paper Company in determining its income for the fiscal year ended April 30, 1921, was entitled to deduct therefrom $4,167.29 representing an actual loss in the value of merchandise and other assets which had been acquired by Zellerbach Paper Company from A. S. Hopkins Company.

(g) The petitioner prays the Board to find that Zellerbach Paper Company in determining its net income for the fiscal year ended April 30, 1921, is entitled to claim a deduction for $840.00 representing wages paid to the captain of the yacht owned by I. Zellerbach, used in connection [16] with petitioner's business.

(h) The petitioner prays the Board to find that National Paper Products Company in determining its income for the fiscal year ended April 30, 1921, is entitled to a deduction of $21,421.05 representing write-down of the value of its wood in process inventory at Carthage, New York, as at April 30, 1921.

(i) The petitioner prays the Board to find that it is entitled to have included in the consolidated invested capital of Zellerbach Paper Company and subsidiaries for the fiscal year ended April 30, 1921, the amount of $10,000.00 representing the value of certain patents which had been substantiated, but were disallowed by the Commissioner.

(j) The petitioner prays the Board to find that the Commissioner erred in deducting from the petitioner's consolidated invested capital the following items, the determination of the correct amount of which is dependent upon the settlement of the petitioner's taxes in controversy for prior years:

1917, 1918, 1919 taxes adjusted	$496 471.96
1920 taxes prorated	255 340.40
Inadmissibles	685 705.61

(k) The petitioner prays for such other and further relief as the nature of the case may require, and [17] which to the Board may seem equitable and proper in the premises.

WHEREFORE, the petitioner prays that the Board may hear and redetermine that there is no deficiency.

JOHN FRANCIS NEYLAN,
Counsel for Petitioner,
Crocker First National Bank Bldg.
San Francisco, California. [18]

State of California,
City and County of San Francisco.—ss.

A. Vander Zwiep, being duly sworn, says that he is the Secretary of Zellerbach Paper Company, and that he is duly authorized to verify the foregoing petition, and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to be upon information and belief, and those facts he believes to be true.

A. VANDER ZWIEP.

Subscribed and sworn to before me this 5th day of July, 1928.

(Seal) LULU A. GODSIL,
Notary Public.

Notary Public in and for the City and County of San Francisco, State of California.

My commission expires September 13, 1931. [19]

Copy

EXHIBIT A.

TREASURY DEPARTMENT
Washington

May 11, 1928

Office of
Commissioner of Internal Revenue

IT:CR:D:60D
CAM

Zellerbach Paper Company,
534 Battery Place,
San Francisco, California.

Sirs:

In accordance with Section 274 of the Revenue Act of 1926 you are advised that the determination of your tax liability for the year 1921, discloses a deficiency of $64,024.37, as shown in the attached statement.

The section of the law above mentioned allows you an appeal to the United States Board of Tax Appeals within sixty days from the date of the mailing of this letter. However, if you acquiesce in this determination, you are requested to execute the inclosed Form A and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the

attention of IT:C:P-7.

Respectfully,

D. H. BLAIR,
Commissioner.

By (Signed) C. B. ALLEN,
Deputy Commissioner.

Inclosures

Statement.
Form A.
Form 882. [20]

IT:CR:D:60 D
CAM

STATEMENT OF RETURNS EXAMINED
AND
RESULTING TAX LIABILITY

Company	Fiscal Year	Form	Deficiency in Tax
Zellerbach Paper Company, San Francisco, Calif.	April 30, 1921	1120 Consolidated	$64,024.37
National Paper Products Co., San Francisco, Calif.	April 30, 1921	1120 Consolidated	$31,141.52
A. S. Hopkins Company San Francisco, Calif.	Period Nov. 1, 1920 to April 30, 1921	1120	$ 1,688.70

The adjustments producing the above-stated results are shown in the attached Schedules 1 to 15, inclusive.

The information submitted in your brief dated February 7, 1928, has been carefully considered.

Your contention that "Depreciation on Merchandise" and "Estimated Bad Accounts", included as taxable income in Batavia Branch, were allowable deductions is denied, as your contention is not substantiated.

Your contention that "Inventory Transfer from A. S. Hopkins Company" is an allowable deduction is denied as same is allowed to A. S. Hopkins Company as a deduction, Schedule 6.

Your contention that items charged to dues and subscriptions in the amount of $470.00, are necessary business expenses is allowed for "Membership Fee, Kiwanis Club" and "Subscription to Linweave Association" but denied for "Book Club of California (J. D. Zellerbach)". [21]

Your contention that items charged to headquarters expense are allowable is conceded for the "Cancellation of Contract", but denied for "Salary to captain of J. Zellerbach's private yacht." The mere fact that customers were occasionally entertained on the yacht is not sufficient reason for allowing the deduction.

Your contention relative to the following items, National Paper Products Company is sustained and allowed:

1. Loss in operation, Brooklyn Soap Plant.
2. Gifts to employees.

3. Unallowable deduction.

Your contention that "Depreciation of Wood Inventory" is allowable is not substantiated.

Your contention for additional depreciation, Carthage Branch has been previously denied for prior years and no evidence having been submitted in your brief to substantiate your claim, the previous denial is sustained.

Your contention that net income for the two months ended December 31, 1920 of A. S. Hopkins Company, should not be included is denied. Evidence shows that the above-named company was affiliated with your company for the period November 1, 1920 to April 30, 1921, accordingly the income for that period is properly income of the consolidation. Adjustment will be made to A. S. Hopkins Company.

Your contention that Patents disallowed from invested capital should be restored in the amount of $10,000.00, has been denied for prior years and that decision is herein sustained.

Your contention for adjustments of taxes prior years and inadmissibles are dependent upon prior years which are still in controversy and no adjustment can be made in this audit.

Inasmuch as no return was filed under the Revenue Act of 1921, the Bureau holds that no Statute of Limitations applies.

A copy of this letter has been mailed to John Francis Neylan in accordance with the authorization contained in your power of attorney dated March 3, 1925, running to him, which is on file in this office [22]

Zellerbach Paper Company. | Year ended April 30, 1921.

SCHEDULE 1.

Net Income

Net income as disclosed by return		$532,238.29
As corrected		774,423.89
Net adjustment		$242,185.60
Unallowable deductions and additional income:		
(1) Deductions allowed prior years	$ 12,192.70	
(2) Items charged to surplus adjustment	15,452.75	
(3) National Paper Products Company Surplus	2,627.38	
(4) Items charged to dues and subscriptions	4,305.37	
(5) Items charged to Headquarters expense	840.00	
(6) Capital expenditures	24,967.78	
(7) Royalties received	2,057.99	
(8) Realized intercompany profit	30,984.78	
(9) Profit on furniture and fixtures	47.72	
(10) Reserve for contingencies	3,398.38	
(11) Taxable Income Batavia Branch	16,521.10	
(12) Auto insurance deducted twice	6,106.48	
	$119,502.43	

Zellerbach Paper Company. Year ended April 30, 1921.

Schedule 1, continued

(13) Bad debts deducted twice	$144,091.38	
(14) Dividends received from domestic corporation overstated	21,000.00	
(15) Depreciation disallowed	10,887.51	
Total		$295,481.32
Nontaxable income and additional deductions:		
(16) Income reported prior years	$ 33,903.78	
(17) Adjusting book value of automobile	219.67	
(18) Items not deducted	2,504.14	
(19) Commissions	15,000.00	
(20) Loss on automobiles	1,668.13	
Total		$ 53,295.72
Net adjustment as above		$242,185.60

[23]

SCHEDULE 2.

Explanation of Items Changed

(1) Charges to surplus during taxable year which were allowed as deductions in prior years.

(2) Amounts charged to surplus not allowable deductions being in effect capital items.

(3) National Paper Products Company surplus charged to Zellerbach surplus April 30, 1921.

(4) Donations charged to surplus:

Y. W. C. A.	$ 500.00
Salvation Army	100.00
National Democratic Convention	100.00
Y. M. C. A.	200.00
Better America Federation	150.00
Book Club of California (J. D. Zellerbach)	250.00
San Francisco War Memorial	2,500.00
48 Hour League	405.37
Portland Branch expense (Not substantiated)	100.00
Total	$4,305.37

Schedule 2, continued

(5)	Salary of captain private yacht J. Zellerbach not deductible.		
(6)	Building improvements, 534 Battery Street		$ 20,964.21
	Second Street Tunnel assessment		4,003.57
	Total		$ 24,967.78
(7)	Royalties received not reported.		
(8)	Intercompany profit eliminated from inventory April 30, 1920, realized during taxable year.		
(9)	Profit on furniture and fixtures sold:		
	Selling Price		$ 2,109.92
	Cost	$ 3,863.95	
	Less: Depreciation	2,126.75	1,737.20
	Profit corrected		$ 372.72
	Less: Reported		325.00
	Additional profit		$ 47.72

[24]

Schedule 2, continued

(10) Self-Explanatory.

(11) Profit of Batavia, Java Branch taken up on books March 31, 1922, properly income taxable year.

(12) and (13) Self-explanatory.

(14) Income received from a foreign corporation deducted as dividends of Domestic Corporations, not allowable deduction.

(15) Depreciation per books		$ 59,873.09
Restored on return		48,779.13
Understated		$ 11,093.96
Depreciation corrected Exhibit A-6	$ 55,406.65	
Add - Amortization of lease acquired May 1, 1920 or $21,000.00. prorated for 10 years	2,100.00	
	$ 57,506.65	
Deducted on return	57,300.20	
Additional deduction		206.45
Net depreciation disallowed		$ 10,887.51

(16) Self-explanatory

(17) Net adjustment of book value of automobile account credited to surplus.

(18) Additional deductions charged to surplus July 31, 1921, properly applicable to taxable year.

(19) Commissions credited to sales February 9, 1921, disallowed as a deduction 1920.

(20) Loss on automobiles sold:

Cost	$ 27,631.53
Less: Depreciation	12,174.76
Net Value	$ 15,456.77
Selling Price	13,946.74
Less corrected	$ 1,510.03
Profit reported	158.10
Additional loss herein	$ 1,668.13

Zellerbach Paper Co.
National Paper Products Co.

Year ended April 30, 1921

SCHEDULE 3.
Net Income

Net income as disclosed by return		$228,010.05
As corrected		355,297.11
Net adjustment		$127,287.06
Unallowable deductions and additional income:		
(1) Decrease in reserve for losses overstated	$ 525.00	
(2) Bad debts deducted twice	2,697.41	
(3) Loss on assets overstated	99.32	
(4) Inventory April 30, 1920 overstated, Carthage	5,568.06	
(5) Income adjustments	550.48	
(6) Donations, etc.	550.00	
(7) Contingent loss	8,189.43	

Zellerbach Paper Co.
National Paper Products Co.

Year ended April 30, 1921

Schedule 3, continued.

(8) Inventory April 30, 1921 understated	840.00	
(9) Depreciation wood inventory	21,421.05	
(10) Increase "Wood in Process" inventory	652.65	
(11) Depreciation disallowed	94,018.72	
		135,112.12
Nontaxable income and additional deductions:		
(12) Income applicable to prior years	$ 1,293.95	
(13) Loss on assets abandoned	5,878.46	
(14) Depletion	652.65	
Total		7,825.06
Net adjustment as above		$127,287.06

BHB-3

SCHEDULE 4.

Explanation of Items Changed.

(1) and (2) Self-explanatory		
(3) Loss claimed on assets sold		$ 648.35
Corrected:		
Cost	$ 3,586.09	
Less: Depreciation	320.03	
	3,266.06	
Selling Price	2,717.03	
Loss corrected		549.03
Overstated		$ 99.32
(4) Decrease wood inventory April 30, 1920		$ 22,736.59
Less: Depreciation of inventory disallowed		17,168.53
Net adjustment herein		$ 5,568.06

Zellerbach Paper Co. Year ended April 30, 1921

Schedule 4, continued.

(5) Items credited surplus April 30, 1922, properly income during taxable year.

(6) Gift Mrs. Bobrick	$	250.00
American Defense Society		250.00
Not substantiated		50.00
Total	$	550.00

(7) The difference between contract purchase price and market price on cases as at April 30, 1921 on deliveries to be received subsequent to April 30, 1921, not an allowable deduction.

(8) Additional cost of $28.00, a thousand on 30,000 cases charged to profit and loss.

(9) Depreciation of wood inventory not deductible.

(10) Contra of (14) below.

BHB-3 [27]

Schedule 4, continued.

(11) Depreciation on books		$173,469.39
Restored on return		148,091.58
Understated		$ 25,377.81
Depreciation corrected Valuation Report dated April 8, 1927:		
Carthage Branch, Schedule 9	$ 33,967.78	
San Francisco Branch, Schedule 11,	23,288.33	
Stockton Branch, Schedule 12	62,252.44	
Total	$119,508.55	
Deducted on return	188,149.46	68,640.91
Total disallowed		$ 94,018.72

(12) Self-explanatory

(13) See Schedule 8, valuation report dated April 8, 1927.

(14) Depletion allowed as shown in valuation report dated March 26, 1927 $ 652.65

Zellerbach PaPaper Co. Year ended April 30, 1921

SCHEDULE 5
Net Income

The Sanitary ry Products Corporation.		
Net loss as di disclosed by books		$ 542.54
As corrected d		1,813.51
Net adjustmenent		$ 1,270.97
Nontaxable ir income and additional deductions:		
(1) Dividenends received	14.00	
(2) Intercoompany interest	1,256.97	
Net adjustmenent as above		$ 1,270.97

BHB-3

SCHEDULE 6.
Net Income

Net income as disclosed by books calendar year 1920		$ 28,134.16
As corrected for period Nov. 1 to Dec. 31, 1920		10,700.61
Net adjustment		$ 17,433.55
Unallowable deductions and additional income:		
(1) Donations	$ 492.00	
(2) Income Taxes paid	5,553.77	
(3) Dividends paid	15,410.00	
(4) Surplus adjustment	14,176.66	
(5) Inventory understated December 31, 1920	10,136.63	
(6) Income not reported	871.89	
Total		46,640.95

Zellerbach Paper Co.
A. S. Hopkins Company

Year ended April 30, 1921

Schedule 6, continued.

Nontaxable income and additional deductions:			
(7) Nontaxable interest		$ 166.82	
(8) Additional depreciation		5,715.28	
(9) Deductions not taken		4,689.34	
(10) Amount applicable to period Jan. 1 to Oct. 31, 1920 or Oct. 12, of $64,203.67 equals		53,503.06	$ 64,074.50
Net adjustment as above			$ 17,433.55

SCHEDULE 7

Explanation of Items Changed.

(1) (2) and (3) Self-explanatory.		
(4) Adjustment to surplus not a deductible item.		
(5) Inventory December 31, 1920 corrected		$274,808.46
Per books		264,671.83
Adjustment		$ 10,136.63

Schedule 7, continued

(6)	Accounts receivable understated		$ 650.74
	Accrued expenses overstated		221.15
	Total		$ 871.89
(7)	Self-explanatory		
(8)	Depreciation corrected:		
	Building December 31, 1919	$10,761.44 at 2%	$ 215.22
	Furniture and Fixtures	11,990.09 at 10%	1,199.01
	Automobiles	16,543.42 at 20%	3,308.68
	Automobiles Additions 1920	3,193.46 at 20%	638.69
	Furniture and fixtures — New Building. Additions 1920	17,683.94 at 2% period	353.68
	Total		$ 5,715.28

Schedule 7, continued

As per books		None
Allowed herein		$ 5,715.28
(9) Merchandise not on books		4,167.29
Insurance accrued		522.05
Total		$ 4,689.34

(10) Self-explanatory.

SCHEDULE 8

Consolidated Net Income - 1921

Income corrected:		
Zellerbach Paper Co. (Schedule 1)	$774,423.89	
National Paper Products Co. (Schedule 3)	355,297.11	
A. S. Hopkins Co. (Schedule 6)	10,700.61	
Total		$1,140,421.61
Losses Corrected:		
The Sanitary Products Co. (Schedule 5)		1,813.51
Consolidated Net Income Corrected		$1,138,608.10

Zellerbach Paper Co. Year ended April 30, 1921

SCHEDULE 9.

Computation of Invested Capital.

Capital stock		$6,500,000.00
Surplus (a)		4,420,341.33
(b) Goodwill restored		9,192.87
Total		$10,929,534.20
Deductions:		
(c) Patents disallowed	$10,000.00	
(d) Prior years taxes adjusted	496,471.96	
(e) 1920 taxes prorated	255,340.40	
(f) Dividends prorated	73,424.66	
(g) Inadmissibles	685,705.61	
Total (deduct from above)		1,520,942.63
As constructed		$9,408,591.57

Zellerbach Paper Co. Year ended April 30, 1921

SCHEDULE 10.

Explanations of Items Changed

(a) Surplus April 30, 1919, Schedule 57 (a) letter covering years 1917 to 1920, inclusive		$2,740,477.28
Taxable income Fiscal year April 30, 1920		2,039,940.68
Except interest		8,581.30
Dividends received		$ 16,270.66
Total		$4,805,269.92
Less: Donations	$ 29,178.59	
Dividnds	355,750.00	384,928.59
Surplus April 30, 1920 adjusted		$4,420,341.33

(b) Goodwill restored as agreed in conference of October 25 and 26, 1926.

BHB-3

Schedule 10, continued

(c) Patents disallowed in conference of above date.

(d) Prior years taxes adjusted:

1915 and 1916 additional taxes			$28,241.18
1917 corrected taxes		$440,728.61	
1918 corrected taxes		255,591.71	
1919 corrected taxes		339,890.37	
Total		$1,036,210.69	
Less paid prior to April 30, 1920:			
1917	$207,041.31		
1918	193,597.92		
1919	167,340.68	567,979.91	468,230.78
Total additional taxes			$496,471.96

Zellerbach Paper Co. Year ended April 30, 1921

Schedule 10, continued

(e)	1920 corrected taxes prorated or $607,797.41 x .417808 equals		$253,942.62
	Period ended Oct. 31, 1920, A. S. Hopkins Company $16,727.43, due as follows:		
	$4,181.86—Jan. 15, 1921—106/365 =	$1,214.46	
	4,181.86—April 15, 1921—16/365 =	183.32	1,397.78
	Total		$255,340.40
(f)	Dividends paid May 31, 1920 prorated or $80,000.00 for 335/365 equals		$73,424.66
(g)	(1) Average inadmissible assets	$896,490.00	
	(2) Average Total assets	13,196,168.78	
	Percentage (1) to (2) .06793		
	$10,094,297.18 x 6.793% equals		$685,705.61

BHB-3 [32]

Zellerbach Paper Co. Year ended April 30, 1921

SCHEDULE 11.

Computation of Tax, 1921

Excess Profits Tax

Net Income, Schedule 8	$1,138,608.10
Invested capital, Schedule 9 (/12 for part year)	9,408,591.57
8% of invested capital	752,687.33
Plus exemption, $3,000. (/12 for part year)	3,000.00
Total credit	$ 755,687.33

	Income	Credit	Taxable	Rate	Tax
20%	$1,138,608.10	$755,687.33	$382,920.77	20%	$ 76,584.15

Income Tax

Net Income taxable year	$1,138,608.10	
Less: Interest U. S. obligations not exempt	26,800.59	
Excess Profits Tax	76,584.15	
Exemption (8/12 for part year)	1,333.33	
Balance taxable at 10%	1,033,890.03	
Income tax		103,389.00
Total Income and Excess Profits Tax		$179,973.15

Zellerbach Paper Co. Year ended April 30, 1921

SCHEDULE 12.

Allocation of Total Tax.

Name of Company	Income	Amount
Zellerbach Paper Co.	$ 774,423.89	$122,214.01
National Paper Products Co.	355,297.11	56,070.44
A. S. Hopkins Co.	10,700.61	1,688.70
Total	$1,140,421.61	$179,973.15

BHB-3 [33]

SCHEDULE 13.

Computation of Tax 1921

National Paper Products Company.

Total tax liability allocated Schedule 12		$ 56,070.44
Previously assessed: Account #400,016 July 1921 Consolidated return	$ 83,118.56	
Less: Allocated to Zellerbach Paper Company on basis of income reported	58,189.64	24,928.92
Additional tax		$ 31,141.52

Zellerbach Paper Co. — Year ended April 30, 1921

SCHEDULE 14.

Computation of Tax 1921

A. S. Hopkins Company.

Total tax liability, allocated, Schedule 12		$ 1,688.70
Previously assessed		None
Additional tax		$ 1,688.70

SCHEDULE 15.

Computation of Tax 1921

Total tax liability allocated, Schedule 12		$122,214.01
Previously assessed: Account #400,016		
July 1921 Consolidated return —	$ 83,118.56	
Less: Allocated to National Paper Products Company on basis of income reported	24,928.92	58,189.64
Additional tax		$ 64,024.37

BHB-3

Zellerbach Paper Company.

EXHIB IT A-1

Depreciation

Rate agreed to in conference
of October 25 and 26, 1927.

NOTE: Additions for fiscal years ended April 30, 1920 and 1921 include all branches of Zellerbach Paper Company.

Buildings (Rate 2%)	Cost	April 30, 1921
April 30, 1916 Balance	$326,935.15	$ 6,538.70
April 30, 1918 Additions	4,352.74	87.05
April 30, 1920 Additions	39.00	78
April 30, 1921 Additions	86,685.35	866.85
December 31, 1920 Additions (A. S. Hopkins transfer)	10,761.44	71.74
Totals	$428,773.68	$ 7,565.12
Fixtures and Machinery (Rate 8%)		
April 30, 1916 Balance	$102,981.97	$ 8,238.56
April 30, 1917 Reductions	(14,592.78)	(1,167.42)
April 30, 1918 Additions	13,706.04	1,096.48

Zellerbach Paper Company.

Exhibit A-1, continued

April 30, 1919 Additions	15,113.70	1,209.10
April 30, 1920 Additions	15,152.65	1,212.21
April 30, 1921 Additions	29,605.97	1,184.24
Dec. 31, 1920 Additions (A. S. Hopkins transfer)	28,924.03	771.31
Totals	$190,891.58	$ 12,544.48
Automobiles Rate 20%		
April 30, 1916 Balance	$ 41,951.85	$ 8,390.37
April 30, 1917 Additions	5,517.50	1,103.50
April 30, 1918 Additions	5,335.70	1,067.14
April 30, 1919 Additions	10,682.09	2,136.42
April 30, 1920 Additions	27,864.27	5,572.85
April 30, 1921 Additions	36,518.84	3,651.88
Dec. 31, 1920 Additions (A. S. Hopkins transfer)	14,483.68	965.58
Totals	$142,353.93	$ 22,887.74

BHB-3

Zellerbach Paper Company.
Pacific Paper Company.

EXHIBIT A-2

Depreciation

Fixtures and Machinery Rate 8%	Cost	April 30, 1921
April 30, 1916 Balance	$ 19,354.60	$ 1,548.37
April 30, 1917 Additions	3,353.70	268.30
April 30, 1918 Additions	301.22	24.10
April 30, 1919 Additions	4,343.43	347.47
April 30, 1920 Included in Exhibit A-1		
Totals	$ 27,352.95	$ 2,188.24
Automobiles — Rate 20%		
April 30, 1916 Balance	$ 13,179.37	$ 2,635.87
April 30, 1917 Additions	981.30	196.26
April 30, 1918 Additions	1,418.91	283.78
April 30, 1919 Additions	1,997.25	399.45
Totals	$ 17,576.83	$ 3,515.36

Zellerbach Paper Company.
Pacific Paper Company.

EXHIBIT A-3

Fixtures and Machinery Rate 8%		
April 30, 1916 Balance	$ 14,030.36	$ 1,122.43
April 30, 1917 Additions	3,729.47	298.36
April 30, 1918 Additions	1,636.42	130.91
April 30, 1919 Additions	2,343.18	187.45
April 30, 1920 Included in Exhibit A-1		
Totals	$ 21,739.43	$ 1,739.15
Automobiles Rate 20%		
April 30, 1916 Balance	$ 6,995.79	$ 1,399.16
April 30, 1917 Additions	3,246.13	649.23
April 30, 1918 Additions	1,007.31	201.46
April 30, 1919 Additions	5,638.39	1,127.68
April 30, 1920 Included in Exhibit A-1		
Totals	$ 16,887.62	$ 3,377.53

BHB-3

[36]

Zellerbach Paper Company.
Lambert Paper Company.

EXHIBIT A-4
Depreciation

	Cost	April 30, 1921
January 1, 1917 Fixtures and Machinery	$5,788.45	$463.08
April 30, 1917 Additions Net	255.70	20.46
April 30, 1918 Additions Net	1,468.20	117.46
April 30, 1919 Additions Net	1,131.73	90.54
April 30, 1920 Included in Exhibit A-1		
Totals	$8,644.08	$691.54
Rate 20%		
Jan. 1, 1917 Automobiles	$1,970.00	$394.00
April 30, 1917 Additions Net	469.00	93.80
April 30, 1918 Additions Net	570.75	114.15
April 30, 1919 Additions Net	1,216.00	243.20
Totals	$4,225.75	$845.15

EXHIBIT A-5

Machinery and Equipment Rate 8%		
National Paper Products Company		
April 30, 1919 Balance	$ 654.22	$ 52.34

EXHIBIT A-6

Recapitulation

	April 30, 1921
A-1 Buildings	$7,565.12
Fixtures and Machinery	$12,544.48
Automibiles	22,887.74
A-2 Fixtures and Machinery	2,188.24
Automobiles	3,515.36
A-3 Fixtures & Machinery	1,739.15
Automobiles	3,377.53
A-4 Fixtures & Machinery	691.54
Automobiles	845.15
A-5 Machinery & Equipment	52.34
Total	$55,406.65

BHB-3

[Endorsed] United States Board of Tax Appeals. Filed July 9, 1928. [37]

[Title of Court and Cause.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

1, 2. Admits the allegations in paragraphs 1 and 2.

3. Admits the allegations in paragraph 3, except that he says the deficiencies therein stated have not been assessed.

5. Admits that the petitioner, the Zellerbach Paper Company, is a corporation organized and existing under and by virtue of the laws of the State of California, with its principal office at 534 Battery St., San Francisco, California. Admits that after the enactment of the Revenue Act of 1921, the petitioner did not file a return for the fiscal year ended April 30, 1921. Admits that in determining the deficiencies set forth in 60-day letter dated May 11, 1928, the Commissioner disallowed certain alleged inventory and bad debt adjustments and did not recognize any value as attaching to certain patents. Denies the remaining allegations in paragraph 5.

Denies generally and specifically each and every allegation in taxpayer's petition not hereinbefore expressly admitted, qualified or denied.

WHEREFORE, it is prayed that the petition be denied.

(Signed) C. M. CHAREST
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
JOHN D. FOLEY,
Special Attorney,
Bureau of Internal Revenue.

7/27/28

[Endorsed]: United States Board of Tax Appeals. Filed Aug. 7, 1928. [38]

[Title of Court and Cause.]

MOTION TO FILE AMENDED PETITION

Now comes ZELLERBACH PAPER COMPANY, Petitioner above named, by John Francis Neylan, Esquire, its Counsel, and moves the Board for leave to file an amended petition, same being attached hereto.

JOHN FRANCIS NEYLAN
Counsel for Petitioner.
901 Crocker First National Bank Bldg.,
San Francisco, California.

[Endorsed]: United States Board of Tax Appeals. Filed March 13, 1931. [39]

[Title of Court and Cause.]

AMENDED PETITION.

Now comes the above named petitioner and amends its petition heretofore filed in the above entitled matter on the 9th day of July, 1928, said amended petition being prepared and filed in accordance with a stipulation entered into by and between the petitioner and the respondent by their respective counsel, and filed with the Clerk of the Board of Tax Appeals at Washington, D. C., on the 10th day of February, 1931, a copy of which is attached hereto and made a part hereof.

Said petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:CR:D60-D:CAM) dated May 11, 1928, and as a basis for its proceeding alleges as follows:

1. Petitioner is a corporation organized under the laws of the State of California, and having its principal office and place of business at 534 Battery Street, San Francisco, California. [40]

2. The notice of deficiency, a copy of which is attached to the original petition filed herein, and marked Exhibit "A," and which is incorporated herein by reference thereto, was mailed to the petitioner on May 11, 1928.

3. The taxes in controversy are income and profits taxes for the fiscal year ended April 30, 1921, and the amount in controversy as per the notice of deficiency, was the sum of $64,024.37, which, however, has been altered by stipulation of counsel, a

copy of which is attached hereto and made a part hereof, and is now the sum of $69,114.02.

The deficiency of $64,024.37 as set forth in the notice of deficiency is a portion of a total deficiency of $96,854.59, assessed by the Commissioner of Internal Revenue against Zellerbach Paper Company and its subsidiaries for the fiscal year ended April 30, 1921, as follows:

Zellerbach Paper Company (parent)	$64,024.37
National Paper Products Co. (subsidiary)	31,141.52
A. S. Hopkins Co. (Zellerbach Paper Company as Transferee)	1,688.70
Total deficiency	$96,854.59

The petitioner herein alleges that by reason of those certain stipulations filed in this matter, and in the matter of National Paper Products Co., petitioner, versus Commissioner of Internal Revenue, respondent, Docket No. 39,715, and in the matter of Zellerbach Paper Company, Transferee of A. S. Hopkins Co., petitioner, versus, Commissioner of Internal Revenue, respondent, Docket No. 39,704, the amounts now due from the respective taxpayers are as follows: [41]

Zellerbach Paper Company	$69,114.02
National Paper Products Co.	32,990.18
Zellerbach Paper Co. as Transferee of A. S. Hopkins Co.	1,744.37

Provided, however, that the Statute of Limitations

does not bar the right of the respondent herein to collect the amounts as hereinabove set forth.

The petitioner alleges therefore that the various items in controversy as set forth in the original petition filed herein have now been adjusted and agreed upon by and between the parties hereto, save and excepting the question as to whether or not the Statute of Limitations bars the right of the respondent herein to collect said additional taxes or any part of same.

4. Petitioner also alleges that the invested capital of the taxpayer for the fiscal year ended April 30, 1921, cannot be determined until it shall have been finally decided whether Zellerbach Paper Company (petitioner herein) shall be compelled to pay additional taxes for the fiscal year ended April 30, 1919, in the sum of $137,519.64, and the fiscal year ended April 30, 1920, in the sum of $36,540.10, which matter is now in issue in that certain proceeding pending before the United States Board of Tax Appeals and entitled Zellerbach Paper Company, Petitioner, vs. Commissioner of Internal Revenue, Respondent, Docket No. 35599, it being the contention of the said Zellerbach Paper Company that the collection of said taxes for the two fiscal years hereinabove referred to, is barred by the Statute of Limitations. [42]

5. Petitioner also alleges that it is entitled to have considered herein the matter of a certain claim for refund in the sum of $5,127.29 filed by Zellerbach Paper Company as transferee of A. S. Hopkins Co., with the Collector of Internal Revenue at

San Francisco, California, on June 6th, 1928, which claim was thereafter forwarded to the respondent herein, and which claim for refund of taxes illegally collected has not as yet been determined or passed upon by the said respondent.

Additional facts in connection with the question of the invested capital of the petitioner for the fiscal year ended April 30, 1920; and additional facts in connection with said claim for refund will be hereafter set forth in detail.

6. The determination of the tax set forth in the hereinabove mentioned notice of deficiency in the sum of $64,024.37, and the determination of the tax thereafter by the respondent herein, in the sum of $69,114.02, is based upon the following errors:

(a) The Commissioner erred in determining the deficiency set forth in his sixty day letter dated May 11th, 1928, and in his later determination as hereinabove set forth, in respect of the taxes sought to be assessed for the fiscal year ended April 30, 1921, by reason of the fact that the assessment of any additional tax for said fiscal year was and is barred by Sections 250(d) of the Revenue [43] Act of 1918, 250(d)(1) of the Revenue Act of 1921, Section 277(a)(1) and Section 277(a)(2) of the Revenue Act of 1924, and Section 277(a)(2), Section 277(a)(3) and Section 1106(a) of the Revenue Act of 1926, and Section 1 of the Revenue Act of 1928.

(b) The Commissioner in determining the deficiency set forth in his sixty day letter dated May 11, 1928, and in his later determination as hereinabove set forth, erred in proceeding upon

the theory that inasmuch as the petitioner had filed its income tax return under the Revenue Act of 1918, but no additional return was filed by the petitioner under the Revenue Act of 1921, no Statute of Limitation applies.

(c) The Commissioner in determining the deficiency set forth in his sixty day letter dated May 11, 1928, and in his later determination as hereinabove set forth, erred by ruling that an additional return was necessary under the Revenue Act of 1921, inasmuch as there were no items of income or deduction in the consolidated return filed by Zellerbach Paper Company requiring to be treated differently under the respective Revenue Acts of 1918 and 1921.

(d) The Commissioner erred in failing to include as a part of the invested capital of the petitioner for the fiscal year ended April 30, 1921, the sum of $137,519.64 claimed by the Commissioner herein to be due as additional taxes for the fiscal year ended April 30, 1919; and erred in failing to [44] include in the invested capital of the petitioner for the fiscal year ended April 30, 1921, the proper pro rata portion of the sum of $36,540.10 claimed as additional taxes due from the petitioner for the fiscal year ended April 30, 1920. Petitioner alleges in connection therewith that it was not and is not liable for either the sum of $137,519.64 or the sum of $36,540.10, or any part of said sums for the fiscal years ended April 30, 1919, and April 30, 1920, on the ground that the claims of the Com-

missioner of Internal Revenue for said sums are barred by the Statute of Limitations, all as more fully set forth in that certain proceeding pending before the United States Board of Tax Appeals being entitled Zellerbach Paper Company vs. Commissioner of Internal Revenue, Docket No. 35599.

7. The Commissioner erred in including in the income of petitioner herein for the fiscal year ended April 30, 1921, the sum of $10,700.61, which represented two-twelfths of the adjusted net taxable income of A. S. Hopkins Co. for the calendar year 1920, and in failing to reduce the deficiency claimed against this petitioner for said fiscal year in the sum of $5,127.29, all as more fully set forth in that certain claim for refund of taxes illegally collected, filed by Zellerbach Paper Company as Transferee of A. S. Hopkins Co. with the Collector of Internal Revenue at San Francisco, California, on June 6, 1928.

8. The facts upon which the petitioner relies as the basis of this proceeding, are as follows: [45]

(a) Petitioner herein filed its income tax return for the fiscal year ended April 30, 1921, on July 16, 1921, as evidenced by the stipulation filed herein, a copy of which is attached hereto, which return was neither false nor fraudulent. This return was filed under the Revenue Act of 1918, which was in effect until the adoption of the Revenue Act of 1921 on November 23, 1921.

(b) Under the Revenue Act of 1918 any additional assessment was required to be made within five years after the date of the filing of the return. This is provided in Section 250(d) of the Revenue Act of 1918, and carried forward under Section 250(d)(1) of the Revenue Act of 1921, Section 277(a)(2) of the Revenue Act of 1924, Section 277(a)(3) of the Revenue Act of 1926, and Section (1) of the Revenue Act of 1928. The Revenue Act of 1921 provided that any assessment of any additional taxes for the taxable year 1921, or succeeding taxable years, should be determined and assessed by the Commissioner within four years after the return was filed. This was carried forward under Section 277(a)(1) of the Revenue Act of 1924, Section 277(a)(2) of the Revenue Act of 1926, and Section 1 of the Revenue Act of 1928. The return herein, as hereinabove set forth, was filed on the 16th day of July, 1921, and under the Revenue Act of 1918 any additional assessment would necessarily have to be made on or before July 15, 1926, and under the [46] Revenue Act of 1921 any additional assessment would have to be made on or before the 15th day of July, 1925.

(c) The paper entitled "Income and Profits Tax Waiver" dated February 27, 1925, signed by the Petitioner and Respondent, and attached to the stipulation filed herein, and marked Exhibit "A," could not, under any circumstances, extend the time for the making of any addi-

tional assessment beyond December 31, 1925. No assessment has ever been made against the Petitioner herein for additional taxes for the fiscal year ended April 30, 1921, and the deficiency notice was not mailed to the petitioner until May 11, 1928.

(d) It will not be contended herein that any additional tax became due, and it is a fact that no additional tax became due by reason of the adoption of the Revenue Act of 1921, by reason of any change in the basis for the computation of gross income, or the basis for deductions in arriving at net income, and no additional information that could possibly have been furnished by the taxpayer herein would have changed the method of computing the tax due, or would have changed the amount of tax due under the return as filed. The only change made by reason of the adoption of the Revenue Act of 1921 was to eliminate the $2,000.00 exemption allowed to this Petitioner under the Revenue Act of 1918 (or the proper [47] pro rata thereof, the petitioner having filed a consolidated return), and it therefore became the duty of the Commissioner under Section 250(b) of the Revenue Act of 1921 to examine the return, and to compute the tax due thereunder. That by reason of this fact the return filed by the petitioner herein on July 16, 1921, under the Revenue Act of 1918, constituted and became a return under the Revenue Act of 1921, adopted on November 23, 1921, and which became retroactive as of January 1st, 1921; that upon the adoption of the

Revenue Act of 1921, it became the duty of the Commissioner to compute the tax due from this petitioner, or to recompute said tax, if necessary, and to advise the taxpayer in relation thereto.

(e) The facts in relation to the invested capital of the petitioner for the fiscal year ended April 30, 1921, are as follows: There is now pending before the United States Board of Tax Appeals the matter of Zellerbach Paper Company, Petitioner, vs. Commissioner of Internal Revenue, Respondent, Docket Number 35599, and involving amongst other matters the question as to whether the said Zellerbach Paper Company is liable for additional taxes in the sum of $137,519.64 for the fiscal year ended April 30, 1919, and the additional sum of $36,-540.10 for the fiscal year ended April 30, 1920. It is the contention of the said Zellerbach Paper Company in said proceedings, Docket Number 35599, that the collection of [48] said sums is barred by the Statute of Limitations and the defense of the Statute of Limitations has been interposed in relation to said taxes. In determining the invested capital of the petitioner herein for the fiscal year ended April 30, 1921, the Commissioner of Internal Revenue deducted therefrom the sum of $137,519.53, representing the deficiency claimed for the fiscal year ended April 30, 1919, and the pro rata portion of the sum of $36,540.10 representing the deficiency claimed for the fiscal year ended April 30, 1920,

which latter was based upon the theory that the petitioner would have been required to pay said deficiency claimed for the fiscal year ended April 30, 1920, in four quarterly installments as provided by the Revenue Act of 1918 in effect at that time. If it should be held that the collection of the said sum of $137,519.64 and/or the sum of $36,540.10 is barred by the Statute of Limitations (and it is the contention of the said Zellerbach Paper Company that the collection of both of said sums is so barred) the sum of the said $137,519.64 and the proper pro rata portion of said sum of $36,540.10 should be included in the invested capital of petitioner for the fiscal year ended April 30, 1921.

(f) The facts in relation to the claim for refund filed on behalf of Zellerbach Paper Company as transferee of A. S. Hopkins Co., and in the sum of $5,127.29, are as follows: A. S. Hopkins Co. became affiliated with the petitioner herein as of November 1, 1920. The income of the said A. S. Hopkins Co. for the months of November and December, 1920, in the sum of $10,700.61, was not included in the consolidated income tax return of the petitioner herein for the fiscal year ended April 30, 1921, but was added thereto by the Commissioner. Income and profits taxes on [49] said income for said months of November and December, 1920, were assessed against the petitioner herein as per the Treasury Department letter dated December 28, 1927 (IT:CR:C-CAM). Income

and profits taxes on the same income had previously been assessed against the A. S. Hopkins Co. and said taxes were paid under protest by Zellerbach Paper Company as Transferee, on August 17, 1926. The amount so paid was $5,127.29. Petitioner herein, in conferences with the Commissioner of Internal Revenue, sought to have the said income for the months of November and December, 1920, eliminated from taxable income for the fiscal year ended April 30, 1921, on the ground that taxes had been paid on said income on August 17, 1926, as hereinabove set forth. The Commissioner ruled that the income was properly included in the consolidated return of this taxpayer for the fiscal year ended April 30, 1921, and invited and directed the A. S. Hopkins Co. (Zellerbach Paper Company transferee) to file a claim for refund of said sum of $5,127.29. The Treasury Department letter directing the filing of said claim for refund was dated May 3, 1928 (IT: CR-D-CAM) and was addressed to A. S. Hopkins Co., Zellerbach Paper Co. (Transferee), 534 Battery Street, San Francisco, California. Acting in accordance with said letter, a claim for refund was filed on June 6, 1928, with the Collector of Internal Revenue at San Francisco, California, by A. S. Hopkins Co., Zellerbach Paper Co., Transferee. The petitioner herein [50] on January 15, 1930, addressed the Commissioner of Internal Revenue at Washington, D. C., making inquiry as to the disposition

of said claim for refund, and received a reply from said Commissioner under date of January 24, 1930, stating that the claim was under consideration in the office of General Counsel for the Bureau of Internal Revenue in connection with appeals filed by Zellerbach Paper Company involving the fiscal years ended April 30, 1917, to April 30, 1921, inclusive, and stating further, that the Commissioner was unable to advise when action on said claim would be taken.

It is the contention of this petitioner that the income of the A. S. Hopkins Co. for the months of November and December 1920 has already been subjected to tax, and the taxes paid thereon. It is the contention of the said Zellerbach Paper Company that inasmuch as it has absorbed the said A. S. Hopkins Co. the said Zellerbach Paper Company is the real party in interest as evidenced by the fact that the said Zellerbach Paper Company has already paid the tax on said income in the sum of $5,127.29. It is the contention of the petitioner that said claim for refund should have been heretofore allowed, and the amount with interest thereon should have been refunded. In view of the fact that the respondent herein has advised the petitioner that the said claim for refund is in the hands of General Counsel for the Bureau of Internal Revenue in connection with this appeal, the [51] matter should be here adjusted and the Commissioner should be ordered and directed to allow said claim for refund, or the

appropriate reduction in the tax claimed herein, if it should be held that the Statute of Limitations is not a defense, should be made.

9. WHEREFORE PETITIONER PRAYS that upon an answer being filed by the respondent herein a hearing may be had upon the issues involved, and that upon said hearing the Board find

(a) That the petitioner herein filed its income and profits tax return for the fiscal year ended April 30, 1921, on the 16th day of July, 1921, and that said return was neither false nor fraudulent. That said consolidated return contained all items of income and all deductible items, and, further, that said consolidated return contained all other information required by law to be included in its return, and that at the time of the filing of said return the tax due on the net income of the petitioner was correctly computed.

(b) That the Revenue Act of 1921, adopted on the 23rd day of November, 1921, contained no provision making it necessary for the petitioner herein to file a new consolidated or other return, and, further, that the only change in said act consisted in eliminating the $2,000.00 exemption (or the proper pro rata of same), to which this petitioner was entitled under the Revenue Act of 1918, and that it thereupon became the duty of the respondent [52] herein, under Section 250(b) of the Act of 1921, to compute or to recompute the tax due by reason

of the elimination of the exemption as hereinabove set forth, and to notify the taxpayer in relation thereto.

(c) That the return filed by the petitioner herein on July 16, 1921, and while the Revenue Act of 1918 was in force, constituted and became a valid return under the Revenue Act of 1921, and that it was unnecessary on the part of this petitioner to file a new or additional return after the adoption of the Revenue Act of 1921.

(d) That under the Revenue Act of 1918 in effect at the time the return was filed herein, the Commissioner was required to make any additional assessment of taxes claimed within five years after the date of the filing of the return; that under the Revenue Act of 1921 it became necessary for the Commissioner to make any additional assessment within four years after the return of the petitioner herein was filed. That no additional assessment was made within the time required by either the Revenue Act of 1918 or the Revenue Act of 1921. That no proceedings were instituted for the collection of any additional taxes within the statutory period, and that the notice of deficiency was not forwarded to the petitioner herein until May 11, 1928. That the time within which any additional assessment might be made against this taxpayer was not extended beyond December 31, 1925, and that by reason of these facts the right of the respondent herein to

assess and/or collect any [53] additional taxes from the petitioner herein was and is barred by the Statute of Limitations. Further, that whatever liability existed, if any, at the time of the adoption of the Revenue Act of 1926, said liability was completely extinguished by reason of the provisions of Section 1106(a) of said Revenue Act of 1926.

(e) That if it should be held that the Statute of Limitations does not bar the right of the respondent to collect additional taxes for the fiscal year ended April 30, 1921, that the invested capital of the petitioner for said fiscal year, be adjusted in accordance with the final decision as to the collectibility of any additional taxes from the said Zellerbach Paper Company for the fiscal year ended April 30, 1919, and for the fiscal year ended April 30, 1920, which issues are involved in that certain proceeding entitled Zellerbach Paper Company, Petitioner, vs. Commissioner of Internal Revenue, Respondent, pending before the United States Board of Tax Appeals, Docket Number 35599.

(f) That if it should be held in this proceeding that the collection of the deficiency agreed upon is not barred by the Statute of Limitations, that the Board find that inasmuch as the sum of $10,700.61 has already been subjected to tax, and the tax paid thereon, that credit be allowed to this petitioner in this proceeding in the sum of $5,127.29, said amount representing the overpayment heretofore made by Zeller-

bach Paper Company, as transferee [54] of A. S. Hopkins Co., all as hereinabove set forth.

(g) That such other and further relief be granted as may be meet and proper in the premises.

JOHN FRANCIS NEYLAN,
Counsel for Petitioner.
901 Crocker First National Bank Bldg.,
San Francisco, California. [55]

State of California,
City and County of San Francisco.—ss.

M. R. Higgins, being duly sworn, says that he is the Vice-President of the Zellerbach Paper Company, and that he is duly authorized to verify the foregoing petition, and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to be upon information and belief, and those facts he believes to be true.

M. R. HIGGINS.

Subscribed and sworn to before me this 6th day of March, 1931.

[Seal] LULU A. GODSIL,
Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires September 13, 1931. [56]

[Title of Court and Cause.]

STIPULATION.

It is hereby stipulated and agreed by and between the petitioner and the respondent, by their respective attorneys of record, that the facts herein agreed to may be considered as true by the United States Board of Tax Appeals for the purpose of determining the issues involved in this appeal.

The following statement shows the petitioner's tax liability for the fiscal year ended April 30, 1921:

Correct tax	$127,303.66
Tax assessed (allocated)	58,189.64
Deficiency in tax if not barred by the statute of limitations	$ 69,114.02

During the fiscal year involved in this appeal the petitioner kept its books on the basis of the fiscal year ended April 30, 1921. On July 16, 1921, the petitioner filed with the Collector of Internal Revenue its return of income for the fiscal year ended April 30, 1921 under the provisions of the Revenue Act of 1918, which return disclosed a net income of the petitioner in excess of $500,000.00. After the enactment of the Revenue Act of 1921 no other or further return for the fiscal year ended April 30, 1921 was filed by the petitioner. The return as filed [57] by the petitioner under the Revenue Act of 1918 properly showed an exemption of $2000 in computing the tax due. Under the Revenue Act of

1921 this petitioner would be entitled to no such exemption for the fiscal year ended April 30, 1921.

A paper entitled "Income and Profits Tax Waiver" dated February 27, 1925, signed by the petitioner and the respondent, is attached hereto and marked Exhibit "A".

The deficiency letter from which this appeal was taken, covering the fiscal year ended April 30, 1921, was mailed to the petitioner on May 11, 1928, and the petitioner filed its appeal from said deficiency letter with the United States Board of Tax Appeals on July 9, 1928.

The net income of the petitioner and also the total net income of the petitioner and its affiliated companies for the fiscal year ended April 30, 1921, upon which the deficiency was determined and which is now in controversy, is in excess of $500,000.00.

JOHN FRANCIS NEYLAN
Attorney for Petitioner.

C. M. CHAREST
General Counsel,
Bureau of Internal Revenue
Attorney for Respondent.

[Endorsed]: United States Board of Tax Appeals. Filed March 13, 1931. [58]

[Title of Court and Cause.]

ANSWER TO AMENDED PETITION.

The Commissioner of Internal Revenue by his attorney, General Counsel, Bureau of Internal Rev-

enue, for answer to the amended petition filed by the above-named petitioner, admits and denies as follows:

(A). Denies all the material allegations contained in the first unnumbered paragraph of the amended petition.

(B). Admits all the material allegations contained in the second unnumbered paragraph of the amended petition.

1. Admits all the material allegations contained in paragraph numbered 1 of the amended petition.

2. Admits all the material allegations contained in paragraph numbered 2 of the amended petition.

3. Denies all the material allegations contained in paragraph numbered 3 of the amended petition, except the following allegations which are admitted:

That the taxes in controversy are income and profits taxes for the fiscal year ended April 30, 1921; that the deficiency in tax for the fiscal year ended April 30, 1921, if not barred by the statute of limitations, is $69,114.02, which amount is the same as the amount shown [59] in stipulation signed on behalf of the petitioner and the respondent and filed with the Board February 10, 1931; and that the only issue before the Board for decision is whether the deficiency is barred by the statute of limitations.

4. Denies all the material allegations contained in paragraph numbered 4 of the amended petition.

5. Denies all the material allegations contained in paragraph numbered 5 of the amended petition.

6. Denies all the material allegations contained in

paragraph numbered 6 of the amended petition.

7. Denies all the material allegations contained in paragraph numbered 7 of the amended petition.

8. Denies all the material allegations contained in paragraph numbered 8 of the amended petition, except such facts as may be alleged in the amended petition which are set forth in a stipulation filed with the Board February 10, 1931.

9. Denies generally and specifically each and every allegation in the petitioner's amended petition contained not hereinbefore admitted, qualified or denied.

(signed) C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
J. ARTHUR ADAMS,
Special Attorney,
Bureau of Internal Revenue.

[Endorsed]: United States Board of Tax Appeals. Filed May 12, 1931. [60]

[Title of Court and Cause.]

STIPULATION.

It is hereby stipulated and agreed by and between the petitioner and the respondent, by their respective attorneys of record, that the facts herein agreed to may be considered as true by the United States Board of Tax Appeals for the purpose of determin-

ing the issues involved in this appeal.

The following statement shows the petitioner's tax liability for the fiscal year ended April 30, 1921:

Correct tax	$127,303.66
Tax assessed (allocated)	58,189.64
Deficiency in tax if not barred by the statute of limitations	$ 69,114.02

During the fiscal year involved in this appeal the petitioner kept its books on the basis of the fiscal year ended April 30, 1921. On July 16, 1921 the petitioner filed with the Collector of Internal Revenue its return of income for the fiscal year ended April 30, 1921 under the provisions of the Revenue Act of 1918, which return disclosed a net income of the petitioner in excess of $500,000.00. After the enactment of the Revenue Act of 1921 no other or further return for the fiscal year ended April 30, 1921 was filed by the petitioner. The return as filed [61] by the petitioner under the Revenue Act of 1916 properly showed an exemption of $2000 in computing the tax due. Under the Revenue Act of 1921 this petitioner would be entitled to no such exemption for the fiscal year ended April 30, 1921.

A paper entitled "Income and Profits Tax Waiver" dated February 27, 1925, signed by the petitioner and the respondent, is attached hereto and marked Exhibit "A".

The deficiency letter from which this appeal was taken, covering the fiscal year ended April 30, 1921, was mailed to the petitioner on May 11, 1928, and the petitioner filed its appeal from said deficiency

letter with the United States Board of Tax Appeals on July 9, 1928.

The net income of the petitioner and also the total net income of the petitioner and its affiliated companies for the fiscal year ended April 30, 1921, upon which the deficiency was determined and which is now in controversy, is in excess of $500,000.00.

(Sgd) JOHN FRANCIS NEYLAN
Attorney for Petitioner.

(Signed) C. M. CHAREST
General Counsel,
Bureau of Internal Revenue,
Attorney for Respondent. [62]

(510M) Docket No. 39701

EXHIBIT A

IT:EN:T-:WR February 27th, 1925

INCOME AND PROFITS TAX WAIVER

(For taxable years ended prior to March 1, 1921.)

Received
R.A.D.
Mar 6 - 1925
Engineering Division

In pursuance of the provisions of existing Internal Revenue Laws Zellerbach Paper Company, a taxpayer of San Francisco, California, and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or

on behalf of said taxpayer for the fiscal year ended April 30, 1921, under existing revenue acts, or under prior revenue acts. This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1925, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or (2) if an appeal is filed with said Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said Board.

Attest

[Seal] ZELLERBACH PAPER COMPANY

Taxpayer

By I. ZELLERBACH, Pres.

President

A. Van Der ZWIEP,

Secretary

D. H. BLAIR,

Commissioner.

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed. [63]

[Endorsed]: United States Board of Tax Appeals. Filed Feb. 10, 1931. [63]

A true copy. Teste.

[Seal] B. D. GAMBLE

Clerk U. S. Board of Tax Appeals.

[Title of Court and Causes Nos. 39701, 39704, 39715.]

FINDINGS OF FACT AND OPINION.

Promulgated May 17, 1932.

The only return filed for the fiscal year ended April 30, 1921 was one filed July 16, 1921. A credit of $2,000 was taken in this return as allowed by the Revenue Act of 1918. Thereafter the Revenue Act of 1921 was approved under which the taxpayer owed additional tax since it was not entitled to the full credit of $2,000. Held, that the return filed did not start the statutory period of limitations.

John Francis Neylan, Esq., for the petitioners.

H. A. Cox, Esq., and F. R. Shearer, Esq., for the respondent.

The Commissioner determined a deficiency in the income tax liability of Zellerbach Paper Company for the fiscal year ended April 30, 1921. He also determined a deficiency in the liability of National Paper Products Company for the same period. He determined, further, that Zellerbach Paper Company was liable as transferee of the A. S. Hopkins Company for a deficiency in that company's tax liability for the period November 1, 1920, to April 30, 1921. The parties have stipulated the correct amount of the deficiency in each case, and the only question in controversy is whether or not the deficiencies are barred by the statute of limitations. [64]

FINDINGS OF FACT.

The parties entered into the following stipulations

Docket No. 39701 Zellerbach Paper Company

The following statement shows the petitioner's tax liability for the fiscal year ended April 30, 1921:

Correct tax	$127,303.66
Tax assessed (allocated)	58,189.64
Deficiency in tax if not barred by the statute of limitations	$ 69,114.02

During the fiscal year involved in this appeal the petitioner kept its books on the basis of the fiscal year ended April 30, 1921. On July 16, 1921 the petitioner filed with the Collector of Internal Revenue its return of income for the fiscal year ended April 30, 1921 under the provisions of the Revenue Act of 1918, which return disclosed a net income of the petitioner in excess of $500,000. After the enactment of the Revenue Act of 1921 no other or further return for the fiscal year ended April 30, 1921 was filed by the petitioner. The return as filed by the petitioner under the Revenue Act of 1918 properly showed an exemption of $2000 in computing the tax due. Under the Revenue Act of 1921 this petitioner would be entitled to no such exemption for the fiscal year ended April 30, 1921.

A paper entitled "Income and Profits Tax Waiver" dated February 27, 1925, signed by the petitioner and the respondent, is attached hereto and marked Exhibit "A".

The deficiency letter from which this appeal was taken, covering the fiscal year ended April 30, 1921, was mailed to the petitioner on May 11, 1928, and

the petitioner filed its appeal from said deficiency letter with the United States Board of Tax Appeals on July 9, 1928.

The net income of the petitioner and also the total net income of the petitioner and its affiliated companies for the fiscal year ended April 30, 1921, upon which the deficiency was determined and which is now in controversy, is in excess of $500,000.00.

Docket No. 39715 National Paper Products Co.

The following statement shows the petitioner's tax liability for the fiscal year ended April 30, 1921:

Correct tax	$57,919.10
Tax assessed (allocated)	24,928.92
Deficiency in tax if not barred by the statute of limitations	$32,990.18

[65]

During the fiscal year involved in this appeal the petitioner kept its books on the basis of the fiscal year ended April 30, 1921. On July 16, 1921 the petitioner filed with the Collector of Internal Revenue its return of income for the fiscal year ended April 30, 1921 under the provisions of the Revenue Act of 1918, which return disclosed a net income of the petitioner in excess of $200,000. After the enactment of the Revenue Act of 1921 no other or further return for the fiscal year ended April 30, 1921 was filed by the petitioner. The return as filed by the petitioner under the Revenue Act of 1918 properly showed an exemption of $2000 in computing the tax due. Under the Revenue Act of 1921

this petitioner would be entitled to no such exemption for the fiscal year ended April 30, 1921.

A paper entitled "Income and Profits Tax Waiver" dated February 27, 1925, signed by the petitioner and the respondent, is attached hereto and marked Exhibit "A".

The deficiency letter from which this appeal was taken, covering the fiscal year ended April 30, 1921, was mailed to the petitioner on May 11, 1928, and the petitioner filed its appeal from said deficiency letter with the United States Board of Tax Appeals on July 9, 1928.

The net income of the petitioner and also the total net income of the petitioner and its affiliated companies for the fiscal year ended April 30, 1921, upon which the deficiency was determined and which is now in controversy, is in excess of $300,000.00

[The two exhibits A mentioned in the above stipulations each waive the time for making assessment of taxes due for the fiscal year ended April 30, 1921 until December 31, 1925.]

Docket No. 39704 Zellerbach Paper Company, Transferee of A. S. Hopkins Co.

The liability for federal income and profits taxes for the period from November 1, 1920 to April 30, 1921, of A. S. Hopkins Company, dissolved, is as shown below:

Correct tax	$1,744.37
Tax assessed	none
Deficiency in tax if not barred by the statute of limitations	$1,744.37

together with statutory interest thereon to the date of payment. [66]

It is further stipulated and agreed that the aforesaid deficiency in tax and interest for the period ended April 30, 1921, is now due from this petitioner as transferee under Section 280 of the Revenue Act of 1926 of the assets of said A. S. Hopkins Company, unless the collection of said tax is now barred by the statute of limitations. Should the Board find that the collection of the said tax is not barred by the statute of limitations the Board may enter an order finding that in law and in equity there is a deficiency in federal income and profits taxes for the period ended April 30, 1921 in the amount of $1,744.37, together with statutory interest thereon to date of payment, due from the petitioner as transferee under Section 280 of the Revenue Act of 1926 of the assets of said A. S. Hopkins Company, a dissolved corporation.

A. S. Hopkins Company was affiliated with the Zellerbach Paper Company, the National Paper Products Company and the Sanitary Products Corporation during the period from November 1, 1920 to April 30, 1921, under the provisions of Section 240 of the Revenue Acts of 1918 and 1921. The Zellerbach Paper Company (parent), the National Paper Products Company and the Sanitary Products Corporation (subsidiaries) kept their books on the basis of the fiscal year ended April 30, 1921 and filed their return on the basis of the fiscal year ended April 30, 1921. On March 15, 1921, Zellerbach Paper Company designated itself, Zellerbach Paper Com-

pany, successors to A. S. Hopkins Company, filed a return in the name of A. S. Hopkins Company for the calendar year 1920 and included in said return the income of said A. S. Hopkins Company for the months of November and December, 1920. The income of A. S. Hopkins Company earned subsequent to December 31, 1920, was included as part of the income of Zellerbach Paper Company in the return filed July 16, 1921, by the Zellerbach Paper Company (parent), the National Paper Products Company and the Sanitary Products Corporation (subsidiaries) under the provisions of the Revenue Act of 1918 covering the fiscal year ended April 30, 1921, which return disclosed a net income in excess of $700,000.00. After the enactment of the Revenue Act of 1921 no other or further return for the fiscal year ended April 30, 1921, was filed by the Zellerbach Paper Company (parent), the National Paper Products Company, the Sanitary Products Corporation or the A. S. Hopkins Company (subsidiaries). No returns other than those referred to in this stipulation covering the fiscal year ended April 30, 1921 or any portion thereof, have been fied by the Zellerbach Paper Company (parent), the National Paper Products Company, the Sanitary Products Corporation and A. S. Hopkins Company (subsidiaries. [67]

The said return filed by the Zellerbach Paper Company (parent), the National Paper Products Company and the Sanitary Products Corporation (subsidiaries) (in which was included the income of the A. S. Hopkins Company earned subsequent to

December 31, 1920 to April 30, 1921) properly showed an exemption of $2000 in computing the tax due. Under the Revenue Act of 1921 the said affiliated companies would be entitled to no such exemption for the fiscal year ended April 30, 1921.

The deficiency letter from which this appeal was taken, covering the period from November 1, 1920 to April 30, 1921, was mailed to the petitioner on May 11, 1928 and the petitioner filed its appeal from said deficiency letter with the United States Board of Tax Appeals on July 9, 1928.

The net income of the said affiliated companies referred to herein for the fiscal year ended April 30, 1921, upon which the deficiency was determined and which is now in controversy is in excess of $1,000,000.

The A. S. Hopkins Company maintained its own set of books and records until December 31, 1920. Thereafter, it maintained no separate set of books, and its operations were mingled with those of Zellerbach Paper Company as if it were a branch of the latter company.

On the return for the A. S. Hopkins Company for the calendar year 1920, at page 3, the following question and answer appears:

> 12. Is over 50 per cent of your outstanding voting capital stock owned by another corporation or by two or more corporations that are affiliated?
>
> The entire capital stock of this Corporation has been bought by the Zellerbach Paper Co. and its entire net assets transferred as of December 31, 1920.

Since the answer to question 12 was in the affirmative, question 14 should have been answered. A proper answer to this question would have shown how the situation changed during the year. This information was not furnished. In the affidavit on this return it was stated to be a return made pursuant to the Revenue Act of 1918. [68]

On the return for the fiscal year ended April 30, 1921 there is no answer to the question "Is this a consolidated return", but the names of the following companies appear at the head of the return: Zellerbach Paper Company, National Paper Products Company, Sanitary Products Corporation. Questions 11, 12, and 13 were not answered. In question 14, pertaining to affiliations with other corporations, the following question was answered "Yes":

> Did substantially the same conditions as are set out in the questionnaire filed for 1919 or prior years, obtain during the entire taxable period 1920?

In the schedules attached to this return, information and figures pertaining to each of the three separate companies above named were set out but no separate information or figures appear in the return pertaining to the A. S. Hopkins Company. This return did not in any way indicate that the A. S. Hopkins Company was one of the affiliated companies for which the return was made nor in any way inform the Commissioner that its income was included in the return. The statement appears in the affidavit supporting this return that it is a return made pursuant to the Revenue Act of 1918.

OPINION.

MURDOCK: The Board has consistently held in situations like the one here present, that a return filed pursuant to the Revenue Act of 1918 is not sufficient to start the period of limitation. The first case of this kind was C. A. Lawton Company, 13 B. T. A. 8, where the Board cited John Wanamaker, Philadelphia, 8 B. T. A. 864, in which a somewhat similar question had been discussed. The other decisions are Hutchinson Company, 14 B. T. A. 367; Valentine-Clark Company, 14 B. T. A. 562 [reversed 52 Fed. (2d) 346]; Gus Holstine Dry Goods Company, 16 B. T. A. [69] 1124; Isaac Goldmann Company, 17 B. T. A. 1103 [reversed 51 Fed. (2d) 427]; Myles Salt Company, Ltd., 18 B. T. A. 742; [reversed 49 Fed. (2d) 232]; Adams, Cushing & Foster, Inc., 19 B. T. A. 89; G. Corrado Coal and Coke Interests, Inc., 19 B. T. A. 691; and E. J. Lorie, et al., 21 B. T. A. 612. Cf. Hill Goldwater, 21 B. T. A. 73, and particularly National Paper Products Company, et al., 26 B. T. A. ..... The Board's reasons for its position are fully set forth in the above opinions and need not be repeated here. Those decisions are supported by Updike v. United States, 8 Fed. (2d) 913. With all due respect to the Courts of Appeal which have reversed the Board, we adhere to our original position because we still feel that it is the correct one.

The Commissioner would support his determination in these cases on another ground. The A. S. Hopkins Company was affiliated with the other companies from November 1, 1920 until the end of the

fiscal period April 30, 1921. The Commissioner contends that its income was never properly reported for this period since its income for November and December, 1920, was reported in a separate return, and its income from January 1, 1921 to April 30, 1921, was included in that of Zellerbach Paper Company without even disclosing that it was so included and without setting forth separately its income and deductions from those of the Zellerbach Paper Company. He cites Commissioner v. Colmer-Green Lumber Company, 49 Fed. (2d) 234 in support of his contention that the statute has not barred him from proceeding further against the Zellerbach Paper Company as a taxpayer and also as a transferee of the assets of A. S. Hopkins Company. The case cited may not be distinguishable from the present case in this connection, but the Board has consistently held that no such segregation in the return is necessary to start the running of the period of limitations. Its [70] first decision to this effect has been affirmed by the Circuit Court of Appeals for the Third Circuit. Stetson & Ellison, 11 B. T. A. 397, affirmed 43 Fed. (2d) 553. See also Peerless Iron Pipe Exchange, Inc., 23 B. T. A. 900.

Reviewed by the Board.

Judgment will be entered under Rule 50.

VAN FOSSAN, dissenting: I am unable to agree with the prevailing opinion in these cases. The conclusions of the Board have been tested by appeal to the courts on three occasions and in each case the Board has been reversed. Valentine-Clark Co., 14 B. T. A. 562; reversed, 52 Fed. (2d) 346; Isaac Gold-

mann Co., 17 B. T. A. 1103; reversed, 51 Fed. (2d) 427; Myles Salt Co., 18 B. T. A. 742; reversed, 49 Fed. (2d) 232. I believe the position taken by the Board in these and like cases has been erroneous and that in the instant case the petitioners should prevail.

MARQUETTE agrees with this dissent. [71]

[Title of Court and Cause.]

MOTION.

Comes now the respondent by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, in pursuance to the Board's interlocutory decision dated May 17, 1932, and moves that the Board find the deficiencies in respect to the above-named petitioners in the following amounts:

Docket No.	Name	Amount	Year
39701	Zellerbach Paper Co.	$69,114.02	Fiscal Year April 30, 1921
39704	Zellerbach Paper Co. Transferee of A. S. Hopkins Co.	$ 1,744.37	Period Nov. 1, 1920 to April 30, 1921.
39715	National Paper Products Company	$32,990.18	Fiscal Year April 30, 1921

inasmuch as the Board's decision does not alter the deficiencies as agreed upon in the stipulation of facts heretofore filed in these proceedings.

(Signed) C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
HENRY A. COX,
Special Attorney,
Bureau of Internal Revenue.

[Endorsed]: United States Board of Tax Appeals.
Filed May 31, 1932. [72]

[Title of Court and Cause.]

NOTICE UNDER RULE 50.

TAKE NOTICE that the Respondent in the above-entitled proceeding filed with the Board on May 31, 1932, a computation and notice, a copy of which is inclosed. This proceeding will be called for hearing upon such computation at 9.30 a. m. on June 29, 1932, before a Division of the Board at its Washington Office, Constitution Avenue at 12th Street, Northwest, unless, prior to that date, your written acquiescence to the entry of a decision based on such computation shall have been filed with the Board.

No further notice of said hearing will be sent.

B. D. GAMBLE,
Clerk.

To: John Francis Neylan, Esq.,
Crocker First National Bank Bldg.,
San Francisco, California. [73]

United States Board of Tax Appeals

Docket No. 39701

ZELLERBACH PAPER COMPANY,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION.

Pursuant to the Board's findings of fact and opinion promulgated May 17, 1932, the respondent, on May 31, 1932 having filed a motion to find the deficiency in the amount agreed upon in the stipulation of facts, and no objection to said motion having been made by the petitioner, after due notice thereof, it is

ORDERED and DECIDED that there is a deficiency for the fiscal year ended April 30, 1921 in the amount of $69,114.02.

[Seal] (Signed) LOGAN MORRIS,
Member,
United States Board of Tax Appeals.

Enter:

[Endorsed]: Entered Jul. 9, 1932. [74]

[Title of Court and Cause.]

PETITION FOR THE REVIEW OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS.

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Now comes Zellerbach Paper Company, by its attorneys, Messrs. John Francis Neylan and J. Paul Miller, and respectfully shows:

I.

Jurisdiction for Review.

This is a proceeding for review by the United States Circuit Court of Appeals for the Ninth Circuit of a decision rendered in the above entitled matter by the United States Board of Tax Appeals, entered on the 9th day of July, 1932, redetermining a deficiency in income and profits taxes for the fiscal year ending April 30, 1921, against the above Petitioner, in the sum of $69,114.02. [75]

This Petition for Review is filed in pursuance of the provisions of Section 1001 of the Act of Congress approved on the 26th day of February, 1926, as amended by the Revenue Act of 1928 and the Revenue Act of 1932.

II.

Your Petitioner is a corporation organized and existing under and by virtue of the laws of the State of California, having its principal office and place of business in the City and County of San Francisco, State of California.

For the fiscal year ending April 30, 1921, Petitioner filed its income and profits tax return on the 16th day of July, 1921, with the Collector of Internal Revenue for the First District of California, whose office was and is located in the City and County of San Francisco, State of California.

III.

Nature of Controversy.

The nature of the controversy is as follows:

On July 16, 1921 Zellerbach Paper Company filed a consolidated income and profits tax return on behalf of itself and its subsidiaries, National Paper Products Company, and Sanitary Products Corporation, with the Collector of Internal Revenue for the First District of California, at San Francisco, California, for the fiscal year ended April 30th, 1921. [76]

This return was filed during the time the Act commonly known as the Revenue Act of 1918 was in effect.

Under the provisions of the Revenue Act of 1918

Under the provisions of the Revenue Act of 1918

in effect at the time the income and profits tax return hereinabove referred to was filed, a corporate taxpayer was allowed an exemption of $2,000.00.

Under the Revenue Act of 1921, which went into effect on November 23, 1921, this exemption was eliminated if the net income of the corporation was in excess of $25,000.00. The income of Zellerbach Paper Company and its subsidiaries for the fiscal year in question was admittedly in excess of $25,000.00 and as a consequence under the 1921 Act, the

Zellerbach Paper Company was not entitled to the exemption of $2,000.00.

The Revenue Act of 1921, which became effective on November 23, 1921, was retroactive as of January 1, 1921 as to certain features thereof. Amongst the retroactive provisions of the Act was the elimination of the $2,000. exemption.

The fiscal year involved herein began May 1, 1920 and ended April 30, 1921. As a result thereof, eight months of the fiscal year fell in the calendar year 1920 and four months fell in the calendar year 1921. The elimination of the $2,000. exemption as hereinabove set forth [77] had the effect of reducing the exemption which the Zellerbach Paper Company was entitled to take in the filing of its return, to the sum of $1,333.34. The tax was increased thereby in the sum of $66.67.

No additional return was filed by the Zellerbach Paper Company for the fiscal year ending April 30, 1921, other than the return hereinabove mentioned.

The statutory period within which the Commissioner of Internal Revenue might make an additional assessment under the Act of 1918 was five years. This period was reduced, under the Revenue Act of 1921, to four years.

Under date of February 27, 1925, the Zellerbach Paper Company executed an "Income and Profits Tax Waiver" extending the time within which the Commissioner of Internal Revenue might make an additional assessment to December 31, 1925. No other waiver was executed.

The deficiency letter, i. e., the so-called sixty day letter, was not issued until May 11, 1928.

An appeal from this sixty day letter was taken to the United States Board of Tax Appeals on the 9th day of July, 1928.

Thereafter, the Commissioner of Internal Revenue filed his Answer to said Petition.

Under date of February 10, 1931, the attorneys for the respective parties filed with the United States Board of Tax Appeals a stipulation wherein it was agreed [78] that the deficiency in tax, if not barred by the Statute of Limitations, amounted to $69,114.02.

On or about the 16th day of March, 1931, the taxpayer, Zellerbach Paper Company, filed with the United States Board of Tax Appeals an amended petition, whereupon the Commissioner of Internal Revenue filed his answer to same.

In the answer to the amended Petition filed by the Commissioner herein, it was admitted "that the only issue before the Board for decision is whether the deficiency is barred by the Statute of Limitations; * * *"

For the purpose of trial before the United States Board of Tax Appeals, the above-captioned case was consolidated with two additional cases, to-wit, Zellerbach Paper Company, as Transferee of A. S. Hopkins Company, Petitioner, v. Commissioner of Internal Revenue, Respondent, Board of Tax Appeals Docket Number 39704, and National Paper Products Company, Petitioner, v. Commissioner of

Internal Revenue, Respondent, Board of Tax Appeals Docket Number 39715. A joint opinion was rendered by the United States Board of Tax Appeals, and reported in 26 B. T. A. 96. Separate Petitions for Review are being filed, however, in connection with each of these three cases.

The Board of Tax Appeals in its opinion rendered in these cases, recognizes that the identical question has been determined against the Commissioner in three cases, to-wit: Myles Salt Company v. Commissioner (C. C. A. 5th) [79] 49 Fed. (2) 232; Isaac Goldman Company v. David Burnet (Court of Appeals of District of Columbia) 51 Fed. (2) 427, and Valentine-Clark Company v. Commissioner (C. C. A. 8th) 52 Fed. (2) 346. Despite this fact, the Board of Tax Appeals refuses to follow the rulings of the courts.

Board of Tax Appeals Member Van Fossan dissented from the majority of the Board, holding that the cases decided by the courts above cited are controlling. Board of Tax Appeals Member Marquette agreed with this dissent.

IV.

Assignments of Error.

The Petitioner states that in the record and proceedings before the Board of Tax Appeals, and in the decision and the final order of redetermination rendered and entered by the Board of Tax Appeals, manifest error occurred which intervened to the prejudice of the Petitioner and the Petitioner assigns the following errors, and each of them, which,

it avers, occurred in said record, proceedings, decision and final order of redetermination, and upon which it relies to reverse said decision and final order of redetermination so rendered and returned by the Board of Tax Appeals, to-wit:

(a) The Board of Tax Appeals erred in holding that the collection of the deficiency in question was not barred by the Statute of Limitations;

(b) The Board of Tax Appeals erred in holding that the income and profits tax return for the fiscal year ended April 30, 1921, filed by the Petitioner on the 16th day of [80] July, 1921, under the provisions of the Revenue Act of 1918, did not start the running of the period of limitation.

(c) The Board of Tax Appeals erred in failing to hold that the return filed on the 16th day of July, 1921, did not become a return under the Revenue Act of 1921, upon the adoption of that Act on November 23, 1921.

(d) The Board of Tax Appeals erred in holding that the Revenue Act of 1921 required the filing of a new income and profits tax return, which would differ from that filed under the Revenue Act of 1918, only by the elimination of a portion of the $2,000 corporate exemption.

(e) The Board of Tax Appeals erred in finding a deficiency against the Petitioner for the fiscal year ending April 30, 1921, in the sum of $69,114.02.

(f) The Board of Tax Appeals erred in rendering a decision for the Respondent.

WHEREFORE, your Petitioner prays:

(1) That this Honorable Court review the decision of the United States Board of Tax Appeals.

(2) That the transcript of the record be prepared in accordance with the law and with the rules of the United States Circuit Court of Appeals for the Ninth Circuit, and transmitted to the Clerk of said court for filing.

(3) That appropriate action be taken by this Honorable Court to the end that the errors complained of may be reviewed and corrected. [81]

(4) For such other and further relief as to this Honorable Court may seem fit and proper.

ZELLERBACH PAPER COMPANY,
By THOMAS McLAREN.
JOHN FRANCIS NEYLAN,
J. PAUL MILLER,
Attorneys for Petitioner,
1 Montgomery Street,
San Francisco, California. [82]

State of California,
City and County of San Francisco.—ss.

Thomas McLaren, being first duly sworn, deposes and says:

That he is the Vice-President of Zellerbach Paper Company, the Petitioner in the above entitled matter; and that as such he had authority to, and did sign the above and foregoing petition; that he

has read the same and knows the contents thereof; that the same is true of his own knowledge, except those matters which are therein alleged on information or belief, and that as to those matters he believes it to be true; that the said petition is filed in good faith, and not for the purpose of delay.

THOMAS McLAREN.

Subscribed and sworn to before me this 1st day of October, 1932.

[Seal] LULU A. GODSIL,

Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires September 13, 1935.

[Endorsed]: United States Board of Tax Appeals. Filed Oct. 4, 1932. [83]

[Title of Court and Cause.]

NOTICE OF FILING OF PETITION FOR REVIEW.

To: C. M. Charest, Esq.,
General Counsel,
Bureau of Internal Revenue,
Washington, D. C.
Attorney for Respondent.

PLEASE TAKE NOTICE that the above named Petitioner did, on the 4th day of October, 1932, file with the United States Board of Tax Appeals a Petition for Review of the decision of said Board in the above entitled cause by the United States

Circuit Court of Appeals for the Ninth Circuit, a copy of which said Petition for Review is herewith served upon you.

(Signed) JOHN FRANCIS NEYLAN,
(Signed) J. PAUL MILLER,
Attorneys for Petitioner,
1 Montgomery Street,
San Francisco, California.

Service of the foregoing Notice and service of a copy of the Petition for Review mentioned in said Notice, is hereby accepted this 4th day of October, 1932.

(Signed) C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue,
Attorney for Respondent.

[Endorsed]: United States Board of Tax Appeals. Filed Oct. 4, 1932. [84]

[Title of Court and Cause.]

STATEMENT OF EVIDENCE

The above-entitled cause came on for hearing before The Honorable E. H. Van Fossan, Member of the United States Board of Tax Appeals, on the 10th day of June, 1931, at Oakland, California, there being present the Petitioner, by its Counsel, Messrs. John Francis Neylan and J. Paul Miller, and the Respondent, by its Counsel, Messrs. H. A. Cox and F. R. Shearer (C. M. Charest, Esq., General Counsel).

Thereupon the following proceedings were had and testimony heard by said Member pertaining to the issues involved in the petition for Review filed with the United States Board of Tax Appeals on the 9th day of July, 1928.

Prior to the introduction of testimony, Counsel for petitioner moved for the consolidation of the above-entitled case for the purpose of the hearing with the two additional cases, to-wit, National Paper Products Company, Petitioner, v. Commissioner of Internal Revenue, Respondent, United States Board of Tax Appeals Docket No. 39715, and Zellerbach Paper Company, as Transferee of A. S. Hopkins Company, Petitioner, v. Commissioner of Internal Revenue, Respondent, United States Board of Tax Appeals No. 39704, which motion was granted.

Thereupon attention was called to the desirability of correcting a certain stipulation which had theretofore been filed in case Docket No. 39704 hereinabove referred to, whereupon the following [85] proceedings took place:—

> "Mr. Neylan: Mr. Cox has the language which has been agreed upon.
>
> "Mr. Cox: At the middle of page 2 of that stipulation, the following language or the following sentence is to be stricken out:
>
> 'A. S. Hopkins Company filed its return on March 15, 1921, for the calendar year 1920, and included in said return its income for the months of November and December, 1920.'

In lieu of that sentence there is to be substituted the following sentence:

> 'On March 15, 1921, Zellerbach Paper Company, designated itself, Zellerbach Paper Company, successors to A. S. Hopkins Company, filed a return in the name of A. S. Hopkins Company for the calendar year 1920 and included in said return the income of said A. S. Hopkins Company for the months of November and December, 1920.'

Then in the next sentence on the same page an insertion is to be made whereby that sentence, as corrected, will read:

> 'The income of A. S. Hopkins Company earned subsequent to December 31, 1920, was included as part of the income of Zellerbach Paper Company in the return filed July 16, 1921, by the Zellerbach Paper Company (parent).'

And then continue with the rest of the sentence just as it now stands in the stipulation without further change, the only change being that after the word 'included' in that sentence there is to be inserted the words 'as part of the income of Zellerbach Paper Company'.

"The Member: That is in Docket number 39704.

"Mr. Cox: Yes."

Thereupon Petitioner's Counsel offered in evidence the original [86] Income and Profits Tax Return of the Zellerbach Paper Company, the Na-

tional Paper Products Company, and the Sanitary Products Corporation for the period May 1st, 1920 to the period ended April 30, 1921. In connection with the offer, the following colloquy occurred:

"Mr. Neylan: Now, in relation to the original return in this matter, I assume it is necessary to introduce that in evidence?

"The Member: We have it before us.

"Mr. Neylan: May I ask counsel for the Government if he will agree, without formal proof, that this return which has been handed to me by counsel for the Government is the original return of the Zellerbach Paper Company, the National Paper Products Company, the Sanitary Products Corporation for the period May 1st, 1920, to the period ended April 1st, 1921, and may this be introduced without objection?

"Mr. Cox: May we ask if the signers of the return were officers of all the companies you have named?

"Mr. Neylan: I will have to verify that, Mr. Cox. Mr. Zellerbach, I may say positively, was certainly an officer of the Zellerbach Paper Company, and of National Paper Products.

"The Member: Was he also an officer of Sanitary Products Corporation?

"Mr. Neylan: This is a consolidated return, your Honor.

"Mr. Cox: We agree that this is the original return for whatever it purports to be.

"Mr. Neylan: That is all I want."

The document was received in evidence and marked "Petitioner's Exhibit No. 1." Thereupon Mr. Neylan, counsel for Petitioner, stated: "This is the only return in relation to this matter that this corporation or these corporations ever filed." [87]

Thereupon the following proceedings took place:—

"Mr. Neylan: Your Honor, I would like to ask at this time if the sixty-day letters in each of these matters which are appended to the petition are considered in evidence and as a part of the record, or is it necessary to introduce them in evidence?

"Mr. Cox: We admitted them to be correct in our answer, did we not?

"Mr. Neylan: I think you did.

* * * * * * *

"Mr. Neylan: As I understand, Government counsel at this time agrees that they may be considered in evidence as the correct sixty-day letters, is that correct, Mr. Cox?

"Mr. Cox: Yes, assuming we admitted them.

"Mr. Neylan: Well, subject to that.

"The Member: If you did not admit them, are you now admitting them?

"Mr. Cox: If your Honor will give me a minute I will see whether we did or not. There was a question as to one of them.

"Mr. Neylan: That was in relation to 1925, Mr. Cox?

"Mr. Cox: Yes, they are all three admitted in the answer.

"The Member: Very well."

Thereupon Counsel for Petitioner made his opening statement, and offered some evidence which was received by the Board, after which Counsel for the Respondent offered in evidence the income and profits tax return of the A. S. Hopkins Company which had been filed by Zellerbach Paper Company as successor to A. S. Hopkins Company, and is the return referred to in the Stipulation entered into between the parties in Docket No. 39704, which return was received in evidence [88] and marked "Respondent's Exhibit A."

Thereupon the following proceedings took place:—

"Mr. Cox: The position of the respondent in this case is that an additional return was necessary under the law and under the regulations of Commissioner which were authorized by law; and it is also our position that the return filed did not segregate the income of all the companies; in other words, the income of the Hopkins Company was not segregated from the income of the Zellerbach Company, but they were both included as the income of the Zellerbach Company, and the Board in several cases, as I understand, has sustained the position of the Commissioner on this case.

"The Member: How does this case differ from the Myles Salt case?

"Mr. Cox: This differs from the Myles Salt case in the matter that I have just pointed out, and there are probably other matters. We wish, for the purpose of the brief, to analyze the re-

turn, and call your Honor's attention to such things as we think mark the distinction between the two cases; but there is that one distinction which I have in mind, that the income of the two companies was not segregated, and under the decision of the Circuit Court of Appeals, for the Fifth Circuit, in Robert H. Lucas, Commissioner, v. Colmer Green Lumber Company, decided April 30, 1931, that was made the basis, as I understand it, of that decision.

"The Member: In that case, as I recall, they held there was not a substantial revelation of the facts necessary to determine the income of each of the corporations.

"Mr. Cox: Yes, of each separate company.

"The Member: And, it therefore, did not comply with their understanding of the statute. It was the same circuit that had the Myles Salt case, was it not? [89]

"Mr. Cox: That was the same Circuit, yes.

"The Member: Is there anything else you wish to submit?

"Mr. Cox: Nothing your Honor."

Thereupon the Petitioner introduced the following testimony in rebuttal:

TESTIMONY OF ALONZO WALLACE HELVERN

Alonzo Wallace Helvern being first duly sworn, on direct examination in substance testified as follows:

My name is Alonzo Wallace Helvern; I reside in San Francisco; my profession is that of a public accountant and tax advisor. I have been a public

(Testimony of Alonzo Wallace Helvern.)

accountant for ten years; I am now and for a number of years past have been familiar with tax matters; I have been associated with the accounting firm of Lybrand, Ross Bros. & Montgomery for a period of ten years; I am the manager of the Tax Department of this firm at the present time and have been since January 1, 1928. I have had occasion to examine the original books and records of account of the Zellerbach Paper Company, National Paper Products Company, and the A. S. Hopkins Company, and I am familiar with the income tax returns of these companies. I heard the point made by Counsel for the Government, Mr. Cox, in connection with the segregation of the income of the A. S. Hopkins Company. I am familiar with the facts in relation to the income of the A. S. Hopkins Company and with the accounting records of Zellerbach Paper Company in relation thereto. My information in relation thereto was gathered in the following manner:

Prior to 1925 I was engaged in auditing rather than income tax work, although income tax work was a part of my duties. I was at that time employed by Lybrand, Ross Bros. & Montgomery and had been [90] engaged by them since January, 1921. Part of my work was the auditing of the accounts of Zellerbach Paper Company. In the ordinary course of my duties as an accountant and as an employee of Lybrand, Ross Bros. & Montgomery I came in contact with the accounts of Zellerbach Paper Company; I was engaged as a senior auditor

(Testimony of Alonzo Wallace Helvern.)

in the auditing of those accounts.

In relation to the income of A. S. Hopkins Company, beginning with October, 1920, I found that all of the capital stock of the A. S. Hopkins Company, or approximately all of that capital stock was acquired by Zellerbach Paper Company during the month of October, 1920. I found that Zellerbach Paper Company continued the A. S. Hopkins Company as a subsidiary maintaining its own set of books and records until December 31, 1920. Thereafter, the A. S. Hopkins Company fully controlled by Zellerbach Paper Company, was continued up to the time of its dissolution as a mere branch of Zellerbach Paper Company and had no separate set of books, its operations being mingled and operated entirely by Zellerbach Paper Company as its own branch. It had no set of books after January 1, 1921. There was no segregation of the income or of the expense of the conducting of the A. S. Hopkins Company; such segregation would have been very impractical, and probably impossible. It was merely a part of Zellerbach Paper Company for accounting purposes.

Thereupon the witness was cross-examined by Government Counsel as follows:

"By Mr. Shearer:

"Q. Now, in regard to the income of the Hopkins Company beginning January 1, 1921, up to the end of the fiscal year that is involved in this case, it is true, is it not, that the Com-

(Testimony of Alonzo Wallace Helvern.)

missioner did determine a substantial income between those periods, January 1, 1921, and the [91] end of this fiscal year, for the Hopkins Company?

"A. If the Commissioner did make such determination, it was not known to me from my subsequent examination of the Revenue Agent's reports and records. There is no indication that any segregation was made by the Commissioner, from any knowledge I have after January 1st.

"Mr. Neylan: Here is one letter, November 1, 1920 to April 30th, 1921—is that what you are looking for?

"Mr. Shearer: Yes.

"Mr. Neylan: That includes the months of November and December, 1920, when it had a separate set of books. You will find that in the deficiency letter. I might say to counsel for the Government that the original thirty-day letter of the Commissioner, dated the 27th day of December, 1927, made no segregation to the Hopkins Company.

"Mr. Shearer: Counsel for Petitioner is correct in his statement. I was laboring under a misapprehension. The income set up in the deficiency letter of May 11, 1928, a copy of which is attached to the original petition in Docket No. 39701 shows that the income for the period ended April 30th, as a matter of fact,

(Testimony of Alonzo Wallace Helvern.)

was two months' income for November and December, 1920.

"No further cross-examination."

The foregoing is the substance of the evidence adduced at the trial of this proceeding pertaining to the issues involved in this appeal.

JOHN FRANCIS NEYLAN.
WCM.

J. PAUL MILLER.
WCM. [92]

I have no objection to the foregoing statement of evidence.

C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue,
Counsel for Respondent.

Settled and approved this 23rd day of May, 1933.

(Sgd) J. E. MURDOCK,
Member, U. S. Board of Tax Appeals.

[Endorsed]: United States Board of Tax Appeals. Lodged May 19, 1933.

[Endorsed]: United States Board of Tax Appeals. Filed May 23, 1933. [93]

[Title of Court and Cause.]

PRAECIPE FOR RECORD.

To the Clerk of the United States Board of Tax Appeals:

You will please prepare and, within sixty days from the date of the filing of the Petition for Review in the above entitled case, transmit to the Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit certified copies of the following documents:

1. The docket entries of all proceedings before the Board of Tax Appeals in the above entitled cause;

2. The Petition of the taxpayer, together with deficiency letter dated May 11, 1928, attached to which is "Statement of Returns Examined and Resulting Tax Liability;"

3. Answer of Commissioner of Internal Revenue;

4. Stipulation between attorneys for respective parties filed with the Board of Tax Appeals on or about February 10th, 1931;

5. Motion to file Amended Petition and Amended Petition; [94]

6. Commissioner's Answer to Amended Petition;

7. Notice to Produce from Petitioner's Attorney to Attorney for Respondent. (Not of record.)

8. Findings of Fact and Opinion of the Board, including Dissenting Opinion;

9. Motion of Counsel for Respondent to find deficiency in sum of $69,114.02;

10. Notice under Rule 50;

11. Decision of the Board;

12. Petition for Review to the Circuit Court of Appeals for the Ninth Circuit;

13. Notice of Filing of Petition for Review;

14. Petitioner's Exhibit number one, being the consolidated Income and Profits Tax Return filed by Petitioner on behalf of itself, National Paper Products Company, and Sanitary Products Corporation;

15. Respondent's Exhibit "A", being Income and Profits Tax Return filed by Zellerbach Paper Company, as successor to A. S. Hopkins Company for the calendar year 1920;

16. Statement of Evidence;

17. This Praecipe;

the foregoing to be prepared, certified, and transmitted [95] as required by law and the rules of the Circuit Court of Appeals for the Ninth Circuit.

JOHN FRANCIS NEYLAN,
J. PAUL MILLER,
Attorneys for Petitioner,
1 Montgomery Street,
San Francisco, California.

[Endorsed]: United States Board of Tax Appeals. Filed Oct. 31, 1932. [96]

[Title of Court and Cause.]

CERTIFICATE.

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages,

1 to 96, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 20th day of June, 1933.

[Seal] B. D. GAMBLE,
Clerk,
United States Board of Tax Appeals.

[Endorsed]: No. 7209. United States Circuit Court of Appeals for the Ninth Circuit. Zellerbach Paper Company, a Corporation, Petitioner. vs. Guy T. Helvering, as Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review an Order of the United States Board of Tax Appeals.

Filed July 3, 1933.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

Nos. 7209, 7210 AND 7211

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ZELLERBACH PAPER COMPANY, a Corporation,
Petitioner,
vs.
GUY T. HELVERING, as Commissioner of Internal Revenue,
Respondent.
No. 7209

ZELLERBACH PAPER COMPANY, a Corporation, as Transferee of A. S. Hopkins Company,
Petitioner,
vs.
GUY T. HELVERING, as Commissioner of Internal Revenue,
Respondent.
No. 7210

NATIONAL PAPER PRODUCTS COMPANY, a Corporation,
Petitioner,
vs.
GUY T. HELVERING, as Commissioner of Internal Revenue,
Respondent.
No. 7211

Upon Petitions to Review Orders of the United States Board of Tax Appeals.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

United States Circuit Court of Appeals for the Ninth Circuit

ZELLERBACH PAPER COMPANY, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	Board of Tax Appeals Docket No. 39701
NATIONAL PAPER PRODUCTS COMPANY, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	Board of Tax Appeals Docket No. 39715
ZELLERBACH PAPER COMPANY, as transferee of A. S. Hopkins Company, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	Board of Tax Appeals Docket No. 39704

STIPULATION AND ORDER FOR CONSOLIDATION ON APPEAL.

Whereas, the three above-named cases, upon motion of John Francis Neylan, Counsel for Petitioners,

and consented to by Counsel for Respondent, were consolidated by order of the United States Board of Tax Appeals for trial; and

Whereas, after said trial by the United States Board of Tax Appeals of said consolidated cases, a joint opinion applying to said three cases was rendered by said Board; and

Whereas, petitions for the review of the decision of the United States Board of Tax Appeals by the United States Circuit Court of Appeals for the Ninth Circuit have been filed by the Petitioners with the Clerk of the United States Board of Tax Appeals, and the appeals perfected; and

Whereas, the same point of law is involved in each of said three cases, to-wit: is the collection from the Petitioners of the additional tax claimed by the Respondent for the fiscal year ending April 30th, 1921, barred by the Statute of Limitations; and

Whereas, it is the opinion of the respective Counsel for the parties to the said three cases that it would most suit their convenience in the handling of the said cases on appeal, and would also be of great assistance to the said United States Circuit Court of Appeals in its determination of said cases, if said cases should be consolidated for purposes of appeal;

It is hereby stipulated by and between John Francis Neylan and J. Paul Miller, Counsel for each of the Petitioners in the above-entitled cases, and C. M. Charest, General Counsel, Bureau of Internal Revenue, Counsel for the Respondents in each of said cases,

1. That said cases may be consolidated for the purpose of appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and for the purpose of oral argument before said Court;

2. That but a single printed transcript of record on appeal be prepared by and printed under the direction of the Clerk of said Court, said Clerk to avoid including in said printed transcript more than one copy of such matters and documents as are duplicated in the certified transcripts of record sent up to him by the Clerk of the United States Board of Tax Appeals;

3. That on all occasions, when pursuant to law or rule of court, the parties to said cases are privileged to file briefs, a single brief, rather than three, may be filed, wherein all matters involved in all of said cases may be discussed and argued;

4. That the said three cases may be heard by the United States Circuit Court of Appeals for the Ninth Circuit upon one oral argument before said Court.

Dated: San Francisco, California, February 1st, 1933.

JOHN FRANCIS NEYLAN
J. PAUL MILLER
Attorneys for Petitioner.
C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue,
Attorney for Respondents.

It is hereby ordered, that pursuant to the foregoing stipulation, the three above-named cases be

and they are hereby consolidated in accordance with the terms of said stipulation.

Dated: San Francisco, California, March 10, 1933.

CURTIS D. WILBUR,
United States Circuit Judge.

Now, June 20, 1933, the foregoing Stipulation and Order certified from the record as a true copy.

.....

Clerk Board of Tax Appeals.

[Endorsed]: United States Board of Tax Appeals. Received Mar. 14, 1933.

[Endorsed]: Filed Jul. 3, 1933. Paul P. O'Brien, Clerk.

At a stated Term, to wit, the October Term, A. D. 1932 of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday the twenty-fourth day of July, in the year of our Lord One Thousand Nine Hundred and thirty-three.

Present: Honorable WILLIAM H. SAWTELLE, Circuit Judge, Presiding, Honorable FRANK H. NORCROSS, District Judge.

No.....

In the Matter of the Substitution of Guy T. Helvering, as Commissioner of Internal Revenue in the Place of David Burnet.

Upon consideration of the motion of petitioner or petitioners, consented to by respondent or re-

spondents, in each of the following causes, It Is Ordered that Guy T. Helvering, as Commissioner of Internal Revenue be, and he hereby is substituted for David Burnet, former Commissioner of Internal Revenue in each of the following cases, and that each of the following causes be so continued and maintained:

National Paper Products Company vs. Commissioner of I. R. No. 7140.
Same vs. Same. No. 7211.
Zellerbach Paper Company vs. Commissioner of I. R. No. 7141.
Same vs. Same. No. 7209.
Same vs. Same. No. 7210.

At a stated Term, to wit, the October Term, A. D. 1933 of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Thursday, the fourteenth day of December in the year of our Lord One Thousand Nine Hundred and thirty-three.

Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding, Honorable WILLIAM H. SAWTELLE, Circuit Judge, Honorable FRANCIS A. GARRECHT, Circuit Judge.

ORDER OF SUBMISSION

ORDERED petition to review in each of above causes argued by Mr. John Francis Neylan, counsel

for petitioners, and by Mr. Francis H. Horan, Special Assistant to the Attorney General, counsel for respondent, and submitted to the court for consideration and decision.

At a stated Term, to wit, the October Term, A. D. 1933 of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Wednesday the twenty-eighth day of February in the year of our Lord One Thousand Nine Hundred and thirty-four.

Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding, Honorable WILLIAM H. SAWTELLE, Circuit Judge, Honorable FRANCIS A. GARRECHT, Circuit Judge.

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENTS.

By direction of the Court, ORDERED that the typewritten opinion this day rendered by this court in above causes be forthwith filed by the clerk and that a judgment be filed in each cause and entered in the minutes of this court in accordance with the opinion filed.

[Title of Court and Cause.]

OPINION.

Upon Petitions to Review an Order of the United States Board of Tax Appeals.

Before: WILBUR, SAWTELLE and GARRECHT, Circuit Judges.

WILBUR, Circuit Judge:

Petitioners seek a review of the decision of the Board of Tax Appeals sustaining deficiency tax assessed upon the incomes of the petitioners for their taxable year ending April 30, 1921. A consolidated return was filed by the Zellerbach Paper Company and its affiliated corporations, the National Paper Company and the A. S. Hopkins Company, on July 16, 1921 while the Revenue Act of 1921 was in force and before the enactment of the Revenue Act of 1921, which was made retroactively effective to January 1, 1921. Tax was fixed against each of the corporations on the consolidated return. This consolidated return showed a gross income of $5,826,652.14, credits and deductions claimed of $5,067,846.02, net income of $758,-546.17. The original return is before us and we summarize its contents in the language of the petitioners' brief:

> "The return is on United States Internal Revenue Service Form 1120; it is supported by complete detailed schedules totalling over fifty pages, including the following, stated in consolidated form and separately where necessary, for the parent company and its subsidiaries:

Balance sheets;

Analyses of surplus accounts and reconciliations thereof:

Details of gross income and deductions;

Schedules of depreciation;

Lists of dividends received;

Details of liberty bond exempt interest;

Schedules showing adjustments of book balance sheets for income tax purposes;

Copies of journal entries affecting the foregoing adjustments;

Schedules showing the computation of invested capital;

Schedule of inadmissible assets;

Inventory certificates."

The Commissioner's audit of the return attached to the deficiency letter covers 29 pages of the transcript and shows net income for the Zellerbach Paper Company of $774,423.89, an increase of net income of $242,185.60, and an increase of tax of $64,024.37; a net income of $355,297.11, an increase of tax of $31,141.52, for the National Paper Products Company, and a net income of $10,700.61 and an increase of $1,688.70 for the A. S. Hopkins Company.

The petitioners allege that no changes in their return were made necessary by the Revenue Act of 1921 other than the change in the $2,000 exemption. This allegation was denied and the Board of Tax Appeals made no finding thereon, but did find that the return filed showed an exemption of $2,000 to

which the petitioners were not entitled under the Revenue Act of 1921 for the four months of the taxable year in the calendar year 1921.

The sole question presented is whether or not the deficiency notice of May 11, 1928 was too late.

The Revenue Act of 1926 in force at the time the notice of deficiency was mailed provided that an income tax imposed by the Revenue Act of 1921, or any prior act, must be assessed within four years after "the return" was filed. The only return made by the taxpayer for its taxable year ending April 30, 1921 was that filed July 16, 1921.

The question submitted to us has been decided against the contention of the Commissioner by two Circuit Courts of Appeals (Myles Salt Co. v. Commissioner (C. C. A. 5), 49 Fed. (2d) 232; Valentine Clark Co. v. Commissioner (C. C. A. 8), 52 F. (2d) 346, and by the Court of Appeals of the District of Columbia, Isaac Goldmann v. Commissioner, 51 F. (2d) 427). Nevertheless the Commissioner declines to accept these decisions and the Board of Tax Appeals has again sustained the position of the Commissioner. The Attorney General asks us to sustain the Commissioner and the Board of Tax Appeals is frankly looking to a conflict of decision which will enable him to invoke the jurisdiction of the Supreme Court to settle the conflict in favor of the Commissioner. The question thus presented is one

that must be determined by us according to our own judgment with due consideration of the weight that should be attached to prior decisions of courts of coordinate jurisdiction.

We will first develop the case as we see it and then comment somewhat briefly upon the cases cited above in which the express question has been decided.

What is a return?

Notwithstanding the importance of the question in the administration of the income tax provisions of the Revenue Acts the meaning of the word "return" has never been legislatively defined, and hence the courts have been required to define the term as applied to specific cases presented to them. It is clear from the provisions of the Revenue Acts that the return required from the taxpayer must show his gross income, the deductions and credits, and his net income, within the meaning of those terms as defined in the act itself (Rev. Act. 1921, §239 (a); see Florsheim Bros. Dry Goods Co. v. U. S., 280 U. S. 453). All these terms are flexible and have been changed by almost every Revenue Act. It should be observed that "gross income" is quite distinct from gross receipts and that deductions therefrom permissible by law in estimating the net income are quite distinct from the taxpayer's expenditures, or outgo. The Revenue Acts expressly require the return to show the deductions from the gross income allowed by the law (§239 (a) Rev. Act 1921) to determine the taxable net income. The pe-

titioners in the case at bar do not contend that their return shows either the "deductions" allowed by the Revenue Act of 1921 or the "net income" as fixed by that Act, but they do claim that the return they made July 16, 1921 did show the gross revenue, the deductions therefrom and the net revenue under the Revenue Act of 1918 in force at the time the return was made, and that their failure to show the net income in accordance with the subsequently enacted Revenue Act of 1921 was not their fault because it was impossible to know what the Revenue Act of 1921 would require. This must of course be conceded, but the question remains, did Congress, in requiring a return for the purpose of levying a tax under the Revenue Act of 1921 showing the deductions therein allowed, intend to adopt as sufficient a return theretofore filed which did not show the deductions as therein authorized and provided and did not purport to do so? Was such a return under the Revenue Act of 1918 a return "under this Act" within the meaning of the Revenue Act of 1921 which set the statute of limitations running against the Commissioner? And was it "the return under the Revenue law of 1921" within the meaning of the limitation provisions of §277 (a), sub (2), of the Revenue Act of 1924, or within the meaning of §277 (a) (2) of the Revenue Act of 1926 which was in force at the time the deficiency assessments were levied and which are here involved? To thus state the question is to answer it, and the obvious answer is no. But there is a complication due to the fact that the income tax pro-

visions of the Revenue Act of 1921 passed November 23, 1921 are made retroactive to January 1, 1921, and the petitioners' return was filed after that date. We believe, however, that this is a false quantity in the matter for if by relation of the Act of 1921 to a date prior to the filing, the petitioners' return can be said to be a return "under the Act" the fact that it did not comply with the act (not yet passed) and did not conform to its requirements (not yet known) show that it could not be a return "under the Act" within the meaning of the new Revenue Act requiring other and different statements than were contained in the return on file. It might be said that by the retroactive provisions of the Act of 1921 the return filed by the taxpayer before the Act was passed was a return after it was passed, but not that it was a return "under the Act", because it did not conform to or comply with the act.

The Commissioner rendered a decision March 6, 1922 (T. D. 3305) requiring the taxpayers who had filed a return for the taxable year 1921 (that is, any fiscal year ending in the calendar year 1921) to file a "new return" where under the Revenue Act of 1921 an additional tax was required. This was in accord with his practice under prior revenue acts, particularly when the Revenue Act of 1917 was replaced by the Revenue Act of 1918 (T. D. 2797). In the latter case the rule (T. D. 2797) referred to the return filed under the Revenue Act of 1917 as the "original return" and the return required by the decision as an "amended return".

It is clear from what has been stated that the Revenue Act of 1921 required a return from the petitioners stating, among other things, their deductions, and that the rule of the Commissioner also required a return from the petitioners. They made no such return. It is thought that there is some significance in the use by the Commissioner of the terms "original" return, and "new return" in the decision requiring a "new return" and that therefore the "original return" should be regarded as "the return", or the return "under the Act", within the meaning of the limitation provisions of the Revenue Act of 1921 (§250 (d), the Revenue Act of 1924 (§277 (a) (2) and the Revenue Act of 1926 (277 (a) (2). These terms are wholly unknown to the Revenue Acts. The fact that the Commissioner happened to refer to the return required by the new act as a "new" return, or as an "amended" return is wholly without significance in determining the statute of limitations fixed by Congress in the Act. In this connection the decision of the Supreme Court in Florsheim Bros v. United States, supra, is significant. The Commissioner called for a "tentative return and estimate of corporation income and profits taxes and request for extension of time for filing return" on form 1031T. In holding that this was not a "return" within the meaning of the Revenue Act, the court made clear that the name given by the Commissioner was not of great significance in determining its legal effect. We quote from that opinion as follows:

> "We are of opinion that the filing of the document known as Form 1031T, duly executed, did not start the running of the period of limitation. Form 1031T is not an instrument expressly provided for in the Act. It is not in the nature of a 'list', 'schedule', or 'return', commonly required by tax statutes. It was an invention of the Commissioner designed to meet a peculiar exigency. * * * As Form 1031T made no reference to income, or to deductions or credits, it could not have been intended as the return 'stating specifically the items of gross income, and the deductions and credits'—the return required to satisfy the statute."

In considering the question as to whether or not the Revenue Act of 1921 required a return from those whose taxable year ended in 1921, it is important also to consider the provisions of §205 (a) providing the method by which the taxpayer should make a return "for the fiscal year beginning in 1920 and ending in 1921". This section of the statute required the taxpayer to estimate his gross revenue and his net revenue for his taxable year in accordance with the terms of the Revenue Act of 1918 and to again estimate his gross income and his net income for the taxable year under the provisions of the Revenue Act of 1921. He was required to estimate the tax by taking eight-twelfths of his income estimated under the Revenue Act of 1918 taxed at the rates fixed by the Revenue Act of 1918,

and four-twelfths of the tax on the net income estimated under the Revenue Act of 1921 at the rates provided in the Act of 1921, and his tax for his taxable year was the sum of these two amounts. The Revenue Act of 1921 expressly provides that this tax "shall be his tax *under this title* for the taxable year 1921." (Italics ours) It is clear then that, although the tax for that portion of the taxable year in the calendar year 1920 may be the same that it would have been under the Revenue Act of 1918 and the tax for that portion of the taxable year in the calendar year 1921 may be the same as it would have been under the Revenue Act of 1921, the provision for the method of taxation for the fiscal year 1920 and 1921 is fixed by the Revenue Act of 1921, and the tax is levied under the latter act, that is, to quote the terms of the statute, "under this title". The importance of this method of estimating the net income and the tax thereon is at once apparent when it is noted that the income of the taxpayer may have been actually received in a manner entirely disproportioned to the ratio fixed by the Revenue Act of 1921. The fact that the Revenue Act of 1921 continued in full force and effect the Revenue Act of 1918 until January 1, 1921 made it proper for Congress to enact this special provision for the taxation of those taxpayers whose returns were made for a taxable year ending in 1921, for otherwise it might very properly be contended by the taxpayer that his income actually received under the law of 1918 should be taxed under that law and his income actually

received under the Revenue Act of 1921 should be taxed under that law.

A somewhat similar situation arose under the Revenue Act of October 3, 1917. The Commissioner of Internal Revenue, by Art. 61, Reg. 33, required a return from a corporation which was dissolved prior to the passage of the War Revenue Act of October 3, 1917, which was subject to a tax imposed by the retroactive Act of October 3, 1917. The taxpayer contended that as it had filed a return under a law in existence at the time the return was filed this return started the running of the statute of limitations for making the assessment under the new act. Under these circumstances the district court held that the return made in compliance with the law in existence at the time the return was filed was not such a return as was required by the Revenue Act of October 3, 1917, and regulations thereunder, although it is expressly provided by the Act of October 3, 1917, §212, that "all the provisions of Title 1 of the Act of September 8, 1916, as amended by this act relating to returns, * * * are hereby made applicable to the tax imposed by this title". This decision was sustained by the Circuit Court of Appeals of the Eighth Circuit, December 1, 1925, Updike v. U. S., 8 F. (2d) 913. This was followed by decision to the same effect in U. S. v. Updike, 25 F. (2d) 746, which was sustained by the Circuit Court of Appeals of the Eighth Circuit in Updike v. United States, 32 F. (2d) 1, and by the Supreme Court in 281 U. S. 489. The Supreme Court did not find it necessary, however, to pass on the question

as to whether or not the return filed under the prior law was a return within the meaning of the Revenue Act of 1918 which fixed the limitation for assessment at five years after the return under prior Revenue Acts. In that regard Mr. Justice Sutherland, speaking for the court, said:

> "In accordance with the claim of the government the court below held that there was a failure to file a return within the meaning of paragraph (a). See also Updike v. United States, 8 F. (2d) 913. We assume without deciding the correctness of that view and consider the case accordingly."

The Court of Claims in Ralston v. United States, 58 F. (2d) 1065, had occasion to consider a similar question with relation to the effect of the repeal of the Revenue Act of 1916 and succeeding revenue acts by the Revenue Act of 1918 approved February 24, 1919. That court held on the authority of numerous decisions of the Board of Tax Appeals and of the decisions of the courts in the Updike cases above referred to, and of its own decision in Whitney-Baden Shipping Co. v. United States, 52 F. (2d) 1003, that the return filed June 16, 1919 after the enactment of the Revenue Act of 1918 was "the return" for the taxable year ending in 1918, and that the return of November 30, 1918, which was filed prior to the enactment of the Revenue Act of 1918 was not "the return" which started the statute of limitations running.

Judge Watkins, District Judge for the Western District of South Carolina in a similar case (Clifton Mfg. Co. v. U. S., 3 F. Supp. 508) affected by the enactment of the Revenue Act of 1918 held that the statute of limitations began to run on the filing of the second return on April 29, 1919, after the enactment of the Revenue Act of 1918 and not from the filing of the first return on May 28, 1918 for the taxable year before the enactment of the Revenue Act of 1918.

We will not attempt to repeat in this opinion the course of reasoning adopted by the Court of Claims in its two decisions above cited (Whitney-Baden Shipping Co. v. U. S., supra, Ralston v. U. S., supra,) nor of Judge Watkins (Clifton Mfg. Co. v. U. S., supra). It is sufficient for our purposes to state that that reasoning is in the main applicable to the effect of similar provisions in the Revenue Act of 1921 as related to the superseded Revenue Act of 1918 and the regulations thereunder. In this connection it should be borne in mind that the Revenue Act of 1921 changed the method of determining the gross income and the proper deductions therefrom and therefore changed the method of determining the net income. Consequently, in order that the taxpayer's return should show the gross income and the deductions therefrom according to the Revenue Act of 1921 it was essential that the taxpayer should state the same according to the method laid down in the new act. This was the return required by the act. It happened in the two instances dealt with by the Circuit Courts of Ap-

peals (Myles Salt Co. v. Commissioner, 49 F. (2d) 232, supra, and Valentine-Clark Co. v. Commissioner, 52 F. (2d) 346, supra), and by the Court of Appeals of the District of Columbia, (Isaac Goldmann v. Commissioner, 51 F. (2d) 427), that the only change in the net income of the taxpayer was that resulting from the repeal of the $2,000 exemption given by the Revenue Act of 1918 and repealed by the Revenue Act of 1921. The effect of this change under the provisions of the Revenue Act of 1921 was to increase the net income for the period in the calendar year 1921. It was accordingly held in these cases that the Revenue Act of 1921 did not clearly provide for a new return for taxable years ending in the calendar year 1921 and that the decision of the Commissioner requiring a return in all cases where there was an increased amount of tax under the Revenue Act of 1921 was a recognition of the return already filed as an "original return" and that the "new return" showing additional tax was something supplementary or amendatory to that return and consquently the statute of limitation began to run from the time of the filing of the "original" return and not from the time of filing the new return. These decisions are largely predicated on the proposition that the Commissioner knew the amount of the deduction authorized by the law of 1918 and repealed by the law of 1921, and that the method of apportioning that deduction was fixed by law, and that the net income for the taxable year 1921 could be readily computed, and thus the small additional amount of tax re-

quired by the Revenue Act of 1921 be readily ascertained.

In this connection it should be again observed that the Revenue Act of 1921 expressly required a return. That the return required was to show the allowable deductions and that the return on file did not comply with the requirements of the Revenue Act of 1921 in that respect, but instead showed the deductions authorized under the law of 1918. Not only did the Revenue Act of 1921 require a return showing deductions allowed by that Revenue Act, but the Commissioner expressly required a return in all cases when the tax was increased by the Revenue Act of 1921. The intention of the Commissioner to require a return under the Act of 1921 is clearly expressed in the decision requiring a "new return" in case an additional tax is imposed. We have already said that the fact that the Commissioner referred to the return required as a new "return" is not very significant in our opinion, for the Revenue Act required a return and the fact that the Commissioner called such a return a new return is not decisive or persuasive on the question of the legislative intent in starting the statute of limitations running when "the return" is filed. It should be noted also that under the uniform practice of the Department under all the revenue laws, as shown by the forms provided by the Department for such returns, a practice which is recognized by the various revenue laws themselves, one of the functions of the return is to fix the amount of the tax which the taxpayer

pays contemporaneously with the filing of the return. We will deal with that subject more at length in the companion case, No. 7140. It is fairly obvious that in requiring a return where the tax was increased it was the purpose of the Commissioner to provide a basis for the payment of the additional tax before the Commissioner was in a position to himself assess the tax. If Congress expressly provided for a return by the taxpayer for its fiscal year 1920-1921 as it clearly did, we do not see how the taxpayer can insist that a return filed by it before the Revenue Act of 1921 was enacted and which did not comply with the Revenue Act of 1921, started the running of the limitation under the Revenue Act of 1921 for making the assessment under that act, nor do we see how the phraseology of the decision of the Commissioner which expressly required the filing of a return can be held to excuse the filing of a return, on the theory that he adopted a return theretofore filed when that return is impliedly repudiated by the decision which expressly requires a new return in lieu thereof as a sufficient basis for an assessment of the tax under the Revenue Act of 1921. In determining the responsibilities and duties of the Commissioner and the taxpayer with reference to the return it should be recognized that there are millions of tax returns on file with the Commissioner, many of them no doubt as complicated as that of the petitioner's. Congress has repeatedly recognized that it sometimes takes years to make an adequate and complete investigation of the taxpayer's return and to

make an assessment thereon. Where the new revenue law changes the method of determining the net income by changing the method of determining the gross income or the amount of the deductions therefrom allowed in ascertaining the net income, a construction of the law which would make the period of limitation for the making of the assessment depend upon whether or not there is a change in the taxable base of the particular taxpayer whose return is under consideration, would put the whole question as to when the statute of limitation would run in a state of great uncertainty. It would render it impracticable for the Commissioner to know in a given case when the period of limitation would run, for to determine that question would require as careful an examination of the return as would be necessary to assess the tax.

From the standpoint of the Commissioner the requirement of an additional return where there is an additional tax was both reasonable and necessary. From the standpoint of the taxpayer no hardship was imposed upon him by such a requirement, he is presumed to know the provisions of the new revenue act and is therefore presumed to know that the act required a return in accordance with its provisions; that the act required an additional tax, and that the Commissioner in such a case had required a new return. If he chose to file a return referring to and incorporating his return already filed, the making of a new return would be quite as simple for the taxpayer as the computation of the tax would be for the Commissioner. Such a

return was made in exactly that fashion in the companion case, to which we will refer more particularly in the course of our decision in that case.

We think the really serious question involved in the matter of returns under the new act for the taxable year 1921 is not whether the Commissioner had a right to require a new return under the Revenue Act of 1921, the act itself required it, or whether he intended to do so, as he clearly did in the case at bar, but whether he had a right to excuse taxpayers from making a return under that law as he attempted to do where the statute expressly required such a return, that is, where there was no increase of tax. That question, however, is not involved here and we need not consider it.

We conclude that the taxpayer has failed to file "the return" required to start the statute of limitations running against the making of an assessment. It is conceded that the amount of the tax is correctly stated in the deficiency notice of the Commissioner, and that the same is justly due if the time has not expired for making the assessment.

The decision of the Board of Tax Appeals is affirmed.

[Endorsed]: Opinion. Filed Feb. 28, 1934. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit.

No. 7209

ZELLERBACH PAPER COMPANY,
a Corporation,

Petitioner,

vs.

GUY T. HELVERING, as Commissioner of Internal Revenue,

Respondent.

JUDGMENT.

Upon Petition to Review an Order of the United States Board of Tax Appeals.

This Cause came on to be heard on the Transcript of the Record from the United States Board of Tax Appeals and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the Order of the said Board of Tax Appeals in this Cause be, and hereby is affirmed.

[Endorsed]: Filed and entered Feb. 28, 1934. Paul P. O'Brien, Clerk.

[Title of Court and Cause—Consolidated Cases.]

APPLICATION FOR STAY OF MANDATE

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Come now the Petitioners above named, by Messrs.

John Francis Neylan and J. Paul Miller, their counsel, and hereby make application to this Honorable Court for its order staying the issuance of the mandate in the above entitled cases until April, 29, 1934.

This application is made to this Honorable Court upon the grounds that an opinion in the above named cases was filed on the 28th day of February, 1934, in accordance with which a Judgment or Decree was, on said day, filed and entered, affirming the Judgment or Decree of the United States Board of Tax Appeals, and because of the said opinion, Judgment or Decree of this Court, the petitioners above named desire and intend to petition the Supreme Court of the United States for its Writ of Certiorari in the above entitled cases, requesting the said Supreme Court of the United States to review the decision of this Honorable Court in said matters, basing their said petition for a Writ of Certiorari upon the fact that there now exists a conflict between the following courts: the Circuit Courts of Appeal for the 5th and 8th Circuits and the Court of Appeals of the District of Columbia, on the one hand, and between this Honorable Court on the other hand, the decision of this Honorable Court in the above entitled cases being at conflict with decisions of the aforementioned courts upon identical legal questions.

Wherefore, Petitioners pray that the mandate of this Honorable Court be stayed as hereinabove applied for.

Dated: San Francisco, California, March 15, 1934.

JOHN FRANCIS NEYLAN
J. PAUL MILLER

[Endorsed]: Filed Mar. 15, 1934. Paul P. O'Brien, Clerk.

[Title of Court and Cause—Consolidated Cases.]

ORDER STAYING ISSUANCE OF MANDATE

Upon application of Messrs. John Francis Neylan and J. Paul Miller, counsel for the petititioner, and good cause therefor appearing, It Is Ordered that the issuance, under Rule 32, of the mandate of this Court in the above cause be, and hereby is stayed to and including April 29, 1934; and in the event the petition for a writ of certiorari to be made by the petitioner herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

CURTIS D. WILBUR
United States Circuit Judge.

Dated: San Francisco, California, March 15, 1934.

[Endorsed]: Filed Mar. 15, 1934, Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

[Title of Cause and Number.]

CERTIFICATE OF CLERK U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, PAUL P. O'BRIEN, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred and forty-four (144) pages, numbered from and including 1 to and including 144, to be a full, true and correct copy of the entire record, excluding original exhibits transmitted herewith, of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the petitioner, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 28th day of March, A. D. 1934.

[Seal] PAUL P. O'BRIEN,
Clerk.

[fol. 146] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 4, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(5128-C)